

16
No. 91-905-CFX
Status: GRANTED

Title: William P. Barr, Attorney General, et al.,
Petitioners
v.
Jenny Lisette Flores, et al.

Docketed:
December 9, 1991

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Solicitor General, Solicitor General

Counsel for respondent: Holguin, Carlos, Holguin, Carlos,
Bussiere, Alice, Hagar, John

Time to file ext by J. O'Connor to & inc Dec. 7,
1991 CITED. Dec. 7 was SATURDAY; Dec. 8 was SUNDAY.
Also 40 copies of appendix

Entry	Date	Note	Proceedings and Orders
1	Oct 28 1991	G	Application (A91-304) to extend the time to file a petition for a writ of certiorari from November 7, 1991 to December 7, 1991, submitted to Justice O'Connor.
3	Oct 28 1991		Application for extension of time to file petition and order granting same until December 7, 1991 (O'Connor, October 30, 1991).
2	Oct 30 1991		Application (A91-304) granted by Justice O'Connor extending the time to file until December 7, 1991.
4	Dec 9 1991	G	Petition for writ of certiorari filed.
5	Dec 9 1991		Appendix of petitioner filed.
10	Dec 10 1991		LODGING, consisting of one report, received from the Solicitor General
7	Dec 23 1991		Order extending time to file response to petition until February 7, 1992.
8	Feb 7 1992		Brief of respondents Jenny Lisette Flores, et al. in opposition filed.
9	Feb 12 1992		DISTRIBUTED. February 28, 1992
11	Feb 18 1992	X	Reply brief of petitioner William P. Barr filed.
12	Mar 2 1992		Petition GRANTED. *****
14	Apr 13 1992		Order extending time to file brief of petitioner on the merits until May 7, 1992.
15	May 6 1992		Joint appendix filed.
16	May 7 1992		Brief of petitioners William Barr, et al. filed.
19	May 29 1992		Order extending time to file brief of respondent on the merits until June 29, 1992.
21	Jun 18 1992		Record filed.
		*	Partial proceedings U. S. Court of Appeals for the Ninth Circuit - 1 Box
20	Jun 22 1992		Record filed.
		*	Original proceedings U. S. District Court, Central District of California (4 Boxes)
22	Jun 29 1992		Brief amicus curiae of American Bar Association filed.
23	Jun 29 1992		Brief amici curiae of Child Welfare League of America, et al. filed.
24	Jun 29 1992		Brief amici curiae of Refugee Rights Project, et al. filed.

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Entry	Date	Note	Proceedings and Orders
25	Jun 29 1992	Brief of respondents Jenny Lisette Flores, et al. filed.	
26	Jun 29 1992	Brief amici curiae of United States Catholic Conference, et al. filed.	
27	Jun 29 1992	Brief amicus curiae of Amnesty International U.S.A. filed.	
28	Jul 10 1992	CIRCULATED.	
29	Jul 21 1992	SET FOR ARGUMENT TUESDAY, OCTOBER 13, 1992. (4TH CASE).	
30	Jul 30 1992	X Reply brief of petitioner filed.	
31	Oct 13 1992	ARGUED.	

91-905

Supreme Court, U.S.
FILED

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

Pursuant to 8 U.S.C. 1252(a)(1), the Immigration and Naturalization Service (INS) frequently retains custody of aliens under the age of 18 who are charged with being deportable, in circumstances where there is no parent, legal guardian, or other related adult available to care for the child. By regulation INS must establish a prima facie case of deportability to an examining officer within 24 hours. 8 C.F.R. 287.3. The child thereafter may seek an additional hearing before an immigration judge. 8 C.F.R. 242.2(d). If the child is not released, the regulations require INS to place the child in special alien child-care facilities until a related adult or legal guardian can be located or the deportation proceedings are concluded. The questions presented by this case are two:

1. Whether the regulations violate the substantive due process component of the Fifth Amendment, or any other provision of the Constitution, because the regulations ordinarily prohibit release of these children to unrelated adults.

2. Whether the procedures violate the Due Process Clause of the Fifth Amendment because (a) once the examining officer has determined that there is a prima facie case of deportability, INS does not hold additional hearings to determine probable cause except upon request, or because (b) INS denies release of the children to unrelated adults without conducting individualized hearings to determine whether an unrelated adult seeking custody poses a risk of harm to the child.

II

PARTIES TO THE PROCEEDING

Petitioners here are William P. Barr, Attorney General of the United States, Immigration and Naturalization Service, and Ben Davidian, Western Regional Commissioner of the Immigration and Naturalization Service.

Respondents in this Court are Jenny Lisette Flores, a minor, by next friend Mario Hugh Galvez-Maldonado; Dominga Hernandez-Hernandez, a minor, by next friend Jose Saul Mira; and Alma Yanira Cruz-Aldama, a minor, by next friend Herman Perililo T Sanchez.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of William P. Barr, Attorney General of the United States, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App. 1a-69a) is reported at 942 F.2d 1352. The opinion of the panel of the court of appeals (App. 70a-144a) is reported at 934 F.2d 991.¹ The order of the district court (App. 145a-147a) is unreported.

¹ An earlier version of the opinion of the panel of the court of appeals was reported at 913 F.2d 1315, but was superseded by the opinion reported at 934 F.2d 991.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1991. On October 30, 1991, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including December 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Habeas Corpus Clause, Article I, Section 9, Clause 2, provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The Fifth Amendment provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

3. 8 U.S.C. 1252(a)(1) and 1357(a)(2) are set forth in an appendix (App. 206a-207a).

4. 8 C.F.R. 242.2, 242.24, and 287.3 are set forth in an appendix (App. 207a-221a).

STATEMENT

This case involves the response of the Immigration and Naturalization Service (INS) to a difficult and frequent problem: how to care for unaccompanied alien children pending hearings on their deportability. INS has concluded that it should release such children to their parents, legal guardian, or other related adults, but if none of those persons are available, it normally should entrust their care to special child-care facilities monitored by the Department of Justice. Although the court of appeals concluded that INS's procedures satisfy applicable statutory require-

ments, it nevertheless held that the Constitution requires INS to release the children to unrelated adults willing to assure the children's presence at subsequent administrative hearings, except in cases where INS can demonstrate that the adults would harm the children.

1. Congress has recognized that effective enforcement of United States immigration laws necessarily requires power to arrest and detain aliens suspected of unlawful entry. Accordingly, 8 U.S.C. 1357(a)(2) authorizes INS to arrest an alien without a warrant if it has reason to believe the alien is deportable and would escape before a warrant could be obtained. Upon arrest, the statute requires that "the alien * * * shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." INS regulations require the proceedings before the examining officer to take place "promptly, and in any event within 24 hours." 8 C.F.R. 287.3. The examining officer can continue the detention only if it finds that "there is prima facie evidence that the arrested alien is in the United States in violation of law[]." *Ibid.*²

Section 1252(a)(1) grants the Attorney General broad discretion to determine whether to continue the custody of the aliens detained under these provisions, to release the aliens on bonds "containing such conditions as the Attorney General may prescribe,"

² Title 8 also establishes procedures for arrests pursuant to warrants, but such warrants can be issued only if INS can establish probable cause to believe the alien is deportable, and only if INS already has instituted deportation proceedings before an immigration judge, as set forth in 8 C.F.R. 242.1(a), 242.2(c).

or to release the aliens on conditional parole.³ Pursuant to regulations, the detained alien must be advised that the decision whether he will be released will be made within 24 hours. 8 C.F.R. 287.3. If INS determines to maintain custody, 8 C.F.R. 242.2 requires it to advise the alien of his rights, including his right to be represented by legal counsel of his choice (at no expense to the government), as well as the basis for his arrest, the conditions under which his release has been authorized, and his right to request a hearing before an immigration judge. 8 C.F.R. 242.2(c)(2).⁴ At any time after deportation proceedings are commenced and before the deportation order becomes final, the alien may apply to an immigration judge "for release from custody or for amelioration of the conditions under which he or she may be released." 8 C.F.R. 242.2(d).

2. In response to an ever-growing multitude of deportable children found by INS without their parents or other related adults,⁵ the Attorney General

³ The statute provides:

[A]ny such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

⁴ See 8 C.F.R. 287.3 (stating that "further action [after the examining officer determines there is a prima facie case of deportability] shall be taken as provided in part 242 of this chapter").

⁵ In 1990, INS took custody of 8542 children pending hearings on their deportability. Although INS did not then main-

has exercised his authority under this statutory scheme to promulgate specific regulations governing the custody and release of alien children arrested on deportation charges. 8 U.S.C. 1252(a)(1). The regulations generally provide for release to those individuals historically recognized as appropriate custodians under state law: relatives or legal guardians.

a. First, these regulations *require* the release of children, "in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention," unless INS determines that detention is necessary to ensure presence at the deportation hearing or to ensure the safety of the child or others. 8 C.F.R. 242.24(b)(1). Second, if none of these individuals can be located other than in INS's custody, INS will evaluate simultaneous release of the child and the adult "on a discretionary case-by-case basis." Section 242.24(b)(2). Third, if the parents or legal guardians are unavailable to assume

tain nationwide records regarding the number of those children who were not accompanied by related adults, records from the Southern Region (principally South Texas) show that 73% of the 1317 children detained there in 1990 were unaccompanied. The University of Houston has conducted a statistical study of the 1259 children (accompanied and unaccompanied) detained in 1989 in South Texas. See N. Rodriguez & X. Urrutia-Rojas, *Undocumented and Unaccompanied: A Mental-Health Study of Unaccompanied, Immigrant Children from Central America* (1990) [hereinafter *Undocumented Children Study*] (a copy has been lodged with the Court and furnished to respondents). Of these children, about 35% were from El Salvador, 18% from Guatemala, 17% from Honduras, and 30% from Nicaragua. See *id.* table 2. The children's ages were as follows: 37% were 17 years old; 32% were 16 years old, 17% were 15 years old, and only 14% were 14 or younger. See *id.* table 3.

custody because they are outside the United States or in INS detention, "the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit." Section 242.24(b)(3).

If none of these procedures leads to release, INS "[i]n unusual and compelling circumstances and in the discretion of the district director or chief patrol agent" may release the child to some other adult. 8 C.F.R. 242.24(b)(4). An unrelated adult cannot obtain custody, however, unless he "execut[es] an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings." Section 242.24(b)(3) and (4).

b. If the child is not released, he does not remain in an institutional facility. Instead, INS must make "suitable placement of the juvenile in a facility designated for the occupancy of juveniles." 8 C.F.R. 242.24(c).⁶ Pursuant to an agreement reached at an earlier stage of this litigation, INS must within 72 hours place the child in a facility that meets or exceeds the detailed standards established by the Alien Minors Shelter Care Program of the Community Relations Service in the Department of Justice, 52 Fed. Reg. 15,569-15,573 (1987) [hereinafter CRS Standards] (reprinted in App. 152a-167a). See Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, No. 85-4544-RJK (Px) (C.D. Cal. Nov. 30, 1987) [hereinafter *Child Care Memorandum*], App. 148a-205a.⁷ The program

⁶ Until suitable placement is found, the juvenile "may be temporarily held * * * in any INS detention facility having separate accommodations for juveniles," 8 C.F.R. 242.24(d), where the juvenile will be housed apart from unrelated adults, unless the juvenile is in the care of a related female adult.

⁷ It is important to realize that, for the great majority of the children, the total time period in INS-supervised custody

is designed "to establish a network of community based shelter care programs" that can "provide a safe and appropriate environment for alien minors" during the pendency of administrative proceedings. *Id.* at 170a. Organizations seeking to provide care under the program must meet "state licensing requirements for the provision of shelter care, foster care, group care and related services to dependent children." *Id.* at 176a.⁸

The programs must provide not only for physical custody, but for family reunification services, routine and emergency medical care, comprehensive needs assessment,⁹ recreation, access to religious services, and legal assistance. See CRS Standards, App. 159a; *Child Care Memorandum*, App. 180a-186a. The program requires at least one individual counseling session and at least two group counseling sessions each week. *Child Care Memorandum*, App. 181a-182a. The program also must include education "provided by a teacher certified by the State Department of Education," which must "concentrat[e] primarily on the

is quite short. For example, of the 199 children released from INS custody in November 1991, 82% (164) had been in INS custody for less than 30 days.

⁸ Although the decree by its terms governs only the Western Region, INS practices throughout the country generally follow the terms of the decree.

⁹ In light of the tumultuous conditions in the countries from which these children come, and the frequently traumatic circumstances of their travel to this country, one researcher has concluded that "at least 50% of the children" have "clinically significant levels" of Post-Traumatic Stress Disorder. See *Undocumented Children Study*, *supra* note 5, at 58-59. If the study's conclusions are accurate, it is particularly important that the program provide comprehensive and professional care.

development of basic academic competencies" and occur "in a structured classroom setting, Monday through Friday." *Id.* at 182a-183a. The facilities are to be operated "in a manner which is sensitive to culture, native language and the complex needs of these children." *Id.* at 173a. Finally, the facilities are to be operated "in an open type of setting without a need for extraordinary security measures." *Ibid.*

3. Respondents filed this case in 1985, claiming that INS practices with respect to detained children violate the Constitution and applicable provisions of the immigration laws. The district court granted respondents' motions for summary judgment in a brief order that justified its holding only by stating that it relied "on due process grounds." App. 146a.

The order went on to grant considerable relief to respondents. First, it invalidated the INS policy that limits release of children to unrelated adults, by requiring INS to "release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party." App. 146a. The court did not permit INS to continue its practice of requiring persons to whom it releases children to agree that they would care for the children, but authorized INS only to "require from such persons a written promise to bring such minor before the appropriate officer or court." *Ibid.*

The order also invalidated the INS regulations regarding review of the detention (which, as summarized above, provide for an automatic initial examination, followed by a hearing before an immigration judge only upon request): "Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest

and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor." App. 146a.

4. A divided panel of the court of appeals reversed. App. 70a-144a.

a. Writing for two members of the panel, Chief Judge Wallace first rejected respondents' claim that the child release policy established by 8 C.F.R. 242.24 transgressed the Attorney General's broad authority to detain arrested aliens pending deportation proceedings pursuant to 8 U.S.C. 1252(a)(1). In the court's view, "the language and legislative history of section 1252(a)(1) discloses no intent to limit the Attorney General's power to detain arrested aliens." App. 83a. In particular, the court noted that the "language discloses no limitation" whatsoever "except perhaps that implied by the word 'discretion.'" *Id.* at 84a. Moreover, the majority expressly rejected respondents' contention that the Attorney General has no authority to detain aliens except to serve the purpose of ensuring their future appearance at deportation proceedings. *Id.* at 90a-91a.

b. Chief Judge Wallace then considered respondents' claim that the INS program—even if permitted by statute—contravenes substantive limitations imposed on the government by the Due Process Clause. Acknowledging the plenary control of the political branches over immigration (see App. 96a), he nevertheless concluded that "the substantive component of the due process clause does operate as some limited constraint on congressional power, though the scope of judicial review is extremely narrow." *Id.* at 100a. In his view, the regulation would be subject only to "rational basis" scrutiny, unless it infringed upon a fundamental right. *Id.* at 100a-101a.

Chief Judge Wallace then delineated the nature of the alleged fundamental right as "the right to be released to an unrelated adult," explaining that "the right at stake must be defined narrowly." App. 101a. He concluded: "Given the Constitution's assignment of the plenary political power over deportation to the legislative and executive branches, it is clear that no such right exists." *Id.* at 102a. He noted that this decision was consistent with the Court's repeated statement that the rights of children are not coextensive with those of adults. See *id.* at 105a (citing *Schall v. Martin*, 467 U.S. 253, 263-266 (1984) (holding that a child's liberty interest may be restricted to secure the child's welfare)).

Finally, Chief Judge Wallace concluded that the regulation survived rational-basis scrutiny, because it was rationally related to legitimate ends of the government, such as fostering the welfare and safety of the children. App. 107a-109a.

c. Chief Judge Wallace then turned to respondents' procedural due process claim. He expressed considerable confusion regarding the meaning of the district court's requirement of an "administrative hearing" that must occur "forthwith," noting that 8 C.F.R. 287.3 already requires a hearing for aliens arrested without a warrant. App. 111a-113a. Accordingly, he concluded that the hearing referred to in the order was a hearing before an immigration judge (that is, the hearing currently required upon request by 8 C.F.R. 242.2(d)). App. 112a-113a. Based on his conclusion that the protections required for pretrial detainees do not apply in civil deportation proceedings, Chief Judge Wallace reversed this portion of the order. *Id.* at 113a-117a. In his view, the procedural due process claim should have been decided by analy-

sis of the factors outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1975). Because the district court had not examined those factors in the first instance, the panel remanded the case to the district court for application of the *Mathews* test in the first instance. App. 117a.¹⁰

5. Upon rehearing en banc, the court of appeals reversed by a 7-4 vote on the constitutional issues, without questioning the panel's statutory analysis. Judge Schroeder wrote for six members of the majority.

a. Judge Schroeder first concluded (App. 12a-16a) that "aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest"; she explained that this right was "secured by the Constitution in its enumerated guarantee of habeas corpus." *Id.* at 16a. She also concluded that respondents' rights were not diminished by their minor status (*id.* at 16a-19a).

She then turned to the government purposes involved (App. 19a-24a). In her view, the "case is unprecedented in that it involves post-arrest detention of persons who have not been convicted of any crime, do not pose a risk of flight, and who have not been determined to present any threat of harm to themselves or to the community." *Id.* at 19a. She easily rejected INS's proffered concern for the welfare of children released to unrelated adults. First,

¹⁰ Judge Fletcher did not question Chief Judge Wallace's statutory analysis, but dissented (App. 118a-144a) on the constitutional issues, for reasons substantially similar to the reasons set forth in Judge Schroeder's opinion for the en banc majority, discussed below.

she reasoned that, because INS has no expertise in child welfare, INS's views were "not entitled to any deference." *Id.* at 20a. Examining the welfare concern without deference, she noted INS's reasoning that "since it is unable to do [an appropriate] evaluation [of proposed custodians], the best interests of the child must lie in detention rather than in release" to unrelated adults, but stated without further explanation that "[t]he Constitution requires the opposite conclusion." *Id.* at 21a.¹¹ Accordingly, she held that "INS may not determine that detention serves the best interests of [respondents] in the absence of affirmative evidence that release would place the particular child in danger of some harm." *Ibid.*¹²

Finally, Judge Schroeder considered the procedural due process claim. App. 24a-25a. She declined to determine whether the claim should be resolved

¹¹ She also rejected INS's concern about potential liability for improperly releasing children, explaining that the Court held in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), that a government agency would not be liable under 42 U.S.C. 1983 for harm to a child caused by a private citizen. App. 22a-23a.

¹² The seventh member of the en banc majority, Judge Rymer, concurred in part and dissented in part. App. 41a-52a. Declining to address the substantive constitutional arguments, she would have affirmed portions of the district court's judgment on procedural due process grounds based on her view that the Due Process Clause requires a prompt hearing before a neutral officer. She did not adopt the majority's substantive holding that INS must make an affirmative showing of likelihood of harm to the child, but instead held simply that INS should conduct a hearing to determine whether release was appropriate under the "unusual and compelling circumstances" standard identified in the existing regulation, 8 C.F.R. 242.24(b) (4).

under *Mathews v. Eldridge*, *supra*, or *Gerstein v. Pugh*, 420 U.S. 103 (1976), explaining that the substantive decision discussed above—which "requires that the decision to detain be made only in conjunction with a neutral and detached determination of necessity," App. 24a—required affirmance of the procedural requirements imposed by the district court under either standard. She stated that the existing procedures for a hearing before an immigration judge (see 8 C.F.R. 242.2(d)) were adequate except that (i) a hearing must be held automatically, without regard to a child's request; and (ii) the hearing must include an inquiry into whether any available unrelated adult seeking custody would represent a danger to the child. App. 25a.¹³

b. Chief Judge Wallace dissented, joined by Judges Wiggins, Brunetti, and Leavy, criticizing the en banc majority for reasons similar to the analysis set forth in his panel opinion. App. 52a-69a.

¹³ Judge Tang concurred (App. 26a-37a), generally arguing that the majority's decision could be supported not only by the Habeas Corpus Clause, but also by the substantive component of the Due Process Clause, and that application of *Mathews v. Eldridge* would require a hearing before an immigration judge. Judge Norris also concurred (App. 37a-41a), generally arguing that INS's policy clearly fails to provide due process.

REASONS FOR GRANTING THE PETITION

It is estimated that there are millions of illegal aliens in the United States, and thousands of them are unaccompanied minors. The Attorney General has exercised powers delegated by Congress to establish rules governing the custody and release of these children. Those rules reflect the judgment of the Attorney General that the interests of the United States and the alien children are better served by placing unaccompanied minors in the care of specialized child-care facilities designed to meet their special needs, than by releasing them to unrelated adults who are unwilling or unfit to obtain legal guardianship status under state family-law procedures. The Court of Appeals for the Ninth Circuit simply disagreed. It believed that a different policy was appropriate: INS instead should relinquish custody of an unaccompanied minor to any unrelated adult that requests the release of the child absent "affirmative evidence" that the child would be harmed while in that adult's custody. App. 21a.

The court concluded that the Constitution permitted the substitution of its view for that adopted by the agency, because the policy judgment of the Attorney General was not "entitled to any deference." App. 20a. Yet this Court has emphatically established that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). The lower court's judgment that the Constitution forbids the regulation of that relationship at issue in this case warrants review by this Court. The decision below is based on a standard of judicial scrutiny that squarely conflicts with the prin-

ciples of constitutional interpretation established by this Court, and it invalidates a program of substantial importance to the proper administration of the immigration laws.

1. The lower court's outcome rested on a faulty premise—that the policy judgment reflected in the INS regulation was not "entitled to any deference." App. 20a. This remarkable premise is in sharp conflict with this Court's decisions establishing the standard of judicial review applicable to constitutional challenges to federal policies governing aliens. In *Fiallo v. Bell*, 430 U.S. 787 (1977), this Court rejected an equal protection challenge to family unification policies established under the Immigration and Nationality Act, because "special judicial deference to congressional policy choices in the immigration context" is required. *Id.* at 793 (emphasis added).

It is clear that this "special" deference applies not only to Congress's choices, but to the Executive's exercise of delegated power under the immigration laws as well. As this Court explained in *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), when the Executive exercises its delegated power over aliens "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the constitutionally protected interests of those adversely affected. *Id.* at 770 (discussing a First Amendment claim); see also *Mathews v. Diaz*, 426 U.S. at 83 (rejecting constitutional challenge to immigration policy regulating benefits available to resident aliens because case presented "nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements" to achieve its goals).

Yet the lower court's decision in this case involves precisely the type of judicial second-guessing this Court has prohibited. The court did not question the legitimacy of the stated reasons for the policy—furthering the welfare of the alien children until INS locates a related adult or concludes the deportation proceedings—but found that there were better means available to advance that goal. See App. 21a (“We therefore hold that the INS may not determine that detention serves the best interests of [respondents] in the absence of affirmative evidence that release would place the particular child in danger of some harm.”). The court attempted to justify this marked departure from the governing standard of review by dismissing INS as having no special expertise in the area of child welfare. But in *Fiallo*, another case challenging family unification policies, this Court held that the “scope of judicial review” in the immigration area is not a “function of the nature of the policy choice at issue.” 430 U.S. at 796. So too here. What is more, the terms and conditions of custody or release of aliens pending deportation proceedings fall squarely within the agency’s statutory “responsibility for regulating the relationship” between the United States and “our alien visitors.” *Mathews v. Diaz*, 426 U.S. at 81; 8 U.S.C. 1252(a)(1).

The Ninth Circuit’s reliance on *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-115 (1976), is misplaced. In *Hampton*, this Court declined to afford deference to a Civil Service Commission claim that a regulation adopting a rule excluding aliens from any federal employment represented a permissible exercise of immigration policy. The Court reached this result because it was not clear that the Civil Service Commission—an agency responsible for federal em-

ployment issues—had adopted the rule in furtherance of any federal immigration responsibilities or policies. This Court indicated, however, that it would presume that a regulation was intended to further immigration policies if the “agency which promulgates the rule has direct responsibility for fostering or protecting that interest.” 426 U.S. at 103. Obviously, INS is precisely such an agency; indeed, it is the *only* federal agency with *any* responsibility for caring for these children.¹⁴

2. The constitutional analysis adopted by the court of appeals¹⁵ is so ambitious that it cannot even be

¹⁴ The decision in *Hampton* is also inapposite because it concerns *procedural* due process, not substantive due process. It is one thing to say, as this Court did in *Hampton*, that courts need not defer to an agency’s resolution of policy choices beyond its competence, for purposes of telling whether the policy has been appropriately promulgated and enacted; it is an entirely different thing to say, as the court of appeals has said here, that courts need not defer to the Executive Branch’s policy choices in the course of determining whether the Constitution permits the choice to be made at all. In effect, the court of appeals has relied on a decision that invalidated a policy choice because it was made by the wrong agency to justify a decision holding that the Constitution flatly forbids a policy choice.

¹⁵ Although the opinion of the court of appeals on its face appears to grant relief under the Habeas Corpus Clause, Art. I, § 9, Cl. 2, see App. 16a, respondents’ arguments throughout this litigation have been couched in terms of substantive due process, which we believe is a more appropriate rubric under this Court’s precedents. In any event, the Habeas Corpus Clause is not an independent fount of substantive constitutional rights; on its face, the Clause merely requires a procedure to test whether government detentions violate *other* provisions of the Constitution. Because INS has done nothing that can be construed to suspend the privilege

reconciled with this Court's decisions rejecting challenges to laws establishing pretrial detention for citizens charged with criminal offenses. *Schall v. Martin*, 467 U.S. 253 (1984), and *United States v. Salerno*, 481 U.S. 729 (1987), establish a two-part inquiry for determining whether there is any infringement of a citizen's rights to substantive due process: (1) whether the detention serves legitimate regulatory purposes compatible with fundamental fairness; and (2) if so, whether the terms and conditions of confinement are compatible with those purposes, or whether they instead suggest that the detention is in fact based on punitive motives. *Schall*, 467 U.S. at 269-270; see *Salerno*, 481 U.S. at 747. If that inquiry is satisfied, then the court proceeds to consider whether the procedures provided to determine whether detention is appropriate satisfy procedural due process. See *Schall*, 467 U.S. at 274; *Salerno*, 481 U.S. at 746.

a. The custody here unquestionably serves legitimate regulatory purposes: fostering the welfare and safety of unaccompanied minors and the administrative interests of INS until INS can locate a related adult or conclude the deportation proceedings.¹⁶ As

of the writ of habeas corpus, respondents have no claim under that Clause.

¹⁶ As the CRS Standards published in the Federal Register make clear, concern for the welfare of minors (including family reunification) was the primary purpose for implementing this program. See App. 156a-157a ("Purpose and Scope" section), 159a, 185a-186a. As noted by Chief Judge Wallace, the program also furthers the legitimate ends of ensuring appearance at future deportation proceedings, insulating the INS from liability for harm to the minors, and administrative economy. See App. 108a.

the Court explained in *Schall*, the child's interest in freedom from restraint

must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.

467 U.S. at 265 (citations and internal quotation marks omitted); see *Santosky v. Kramer*, 455 U.S. 745, 766-767 (1982) (discussing the State's *parens patriae* interest in child welfare).

In *Schall*, this Court concluded that the Due Process Clause permitted detention of children designed to further two interests: protection of society from crime, and protection of the child from the consequences of his inability to care for himself. A different conclusion is entirely unwarranted in this case, which squarely implicates the second of these two interests. The *Schall* Court plainly accepted the legitimacy of the governmental interest in retaining custody of children to care for them when parental control falters. See *Schall*, 467 U.S. at 265-266. In our view, this Court's analysis in that case, together with this country's longstanding tradition of governmental involvement in child welfare issues, compels the conclusion that detention to serve this interest is not a practice that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 268 (quot-

ing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

The en banc majority's cursory dismissal of this interest (App. 20a-21a) conflicts with this Court's teaching, even outside the immigration context, that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do," *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984). At bottom, the court of appeals' decision rests on its belief that the children detained by INS generally would be better off if released to unrelated adults than if they were cared for in special child-care facilities until a relative or legal guardian can be located. But this conclusion makes sense only if one accepts the unstated premise that the Constitution forbids the government from making the substantive choice that it is generally inappropriate to release children to unrelated adults.¹⁷ The strong tradition of government interest in child welfare, discussed in detail in *Schall* and *Santosky*, forecloses a determination that the Constitution bars such a choice, especially in a situation that involves unaccompanied alien children who in some cases may have endured significant trauma in the recent past, see note 9, *supra*.¹⁸

¹⁷ The decision of the court of appeals would place INS in a particularly difficult situation in cases where a related adult appeared to take custody of the child after the INS had released the child to an unrelated adult not under its supervision.

¹⁸ The court of appeals' decision intrudes significantly on the important role of the States in making determinations regarding child custody. The States, of course, have carefully developed procedures for determining the qualifications of unrelated adults to care for children. See, e.g., Ariz. Rev. Stat. Ann. §§ 14:5201-14:5212, 14:5401-14:5432 (1975 & Supp. 1991); Cal. Prob. Code §§ 1510-1517 (West 1991). By prefer-

b. In *Schall* and *Salerno*, this Court proceeded to consider whether the conditions of custody were sufficiently compatible with the articulated purposes of custody to justify the conclusion that the government's decision to retain custody actually rested on that purpose, rather than an unstated desire to inflict punishment before conviction. *Schall*, 467 U.S. at 269-274; *Salerno*, 481 U.S. at 747-748. The system established in this case clearly passes this inquiry. As discussed above, see pp. 6-8, *supra*, the Community Relations Service has implemented a detailed program designed to further every significant aspect of the child's welfare. The program compares favorably with the program outlined in *Schall*, 467 U.S. at 270-271. There is little doubt that INS has developed this program to implement the articulated concern for the safety and welfare of detained children (see note 16, *supra*), and the court of appeals agreed that the INS's policy is not intended to punish them. App. 19a.

c. Finally, the available procedures would provide the requisite process under the Fifth Amendment even if respondents were citizens.¹⁹ 8 C.F.R. 287.3 re-

ring release to parents and guardians, the INS policy defers substantially to state-law determinations of guardianship. Although the Constitution would *permit* the federal government to make the policy choice to supplant state-court determinations on these issues by releasing children to the care of unrelated adults who have not taken the trouble to go through the appropriate state-court procedures for becoming a guardian or conservator of the child, it cannot possibly *require* that choice. Cf. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991) (discussing the important role the States play in our federal system).

¹⁹ This Court held in *Mathews v. Diaz*, *supra*, that the process due aliens under the Fifth Amendment is not co-

quires an examination within 24 hours after arrest at which the government must establish a prima facie case of deportability, thus meeting a standard even higher than the probable cause standard required to justify detention of pretrial detainees in criminal proceedings. See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Moreover, before the child makes any choices about his custody, he "must in fact communicate with either a parent, adult relative, friend," or with a legal aid organization. 8 C.F.R. 242.24(g).²⁰ The child is then specifically advised in a language he understands (see 8 C.F.R. 242.24(h)) of the right to seek a hearing before an immigration judge under 8 C.F.R. 242.2(d), at which the child may seek "release from custody or * * * amelioration of the conditions under which he or she may be released." The immigration judge's decision, in turn, is subject to administrative review by the Board of Immigration Appeals, *ibid.*; 8 C.F.R. 3.1(b)(7), and then by the federal courts. See 8 U.S.C. 1252(a)(1).

These procedures put the child in contact with a responsible adult not affiliated with our government and entitle the child to a full administrative hearing before an immigration judge at any time he wishes to challenge the government's decision to retain custody; accordingly, they satisfy the Constitution. First, the conclusion of the court of appeals—that the govern-

extensive with that due citizens. 426 U.S. at 78. The process afforded by INS accordingly could be adequate even if the Fifth Amendment might require greater procedural protections for citizens.

²⁰ Juveniles from Mexico and Canada are given the option to contact an adult by phone, but by treaty communication with consular authorities is required without regard to the juvenile's wishes. See 8 C.F.R. 242.2(g), 242.24(g).

ment should hold a hearing to establish affirmative evidence of anticipated harm to the child in each case where an unrelated adult seeks custody—necessarily rests on the unstated premise that the Constitution bars the government's substantive conclusion that release to an unrelated adult should be disfavored and that home visits, not hearings before immigration judges, are needed to assess accurately whether an unrelated adult is fit to assume custody of a child.²¹ If the Constitution permits the conclusion adopted by the agency, as we have demonstrated above, the child is adequately protected by his right to seek a hearing before the immigration judge.²²

²¹ If the government is entitled, as a general matter, to enact a rule of law forbidding release to unrelated adults except in unusual and exceptional circumstances, there would be no reason for a hearing to determine whether the government could prove the anticipated harm in each case, because the existence of particularized harm would be irrelevant to the determination. See *Michael H. v. Gerald D.*, 491 U.S. 110, 126 (1989) (plurality opinion of Scalia, J.) ("It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration."), *id.* at 132-133 (Stevens, J., concurring) (agreeing with this proposition).

²² We believe that the court of appeals erred in relying heavily on *Schall v. Martin*, *supra*, for the proposition that an individualized hearing is required in each case. Detention in *Schall* was justified only in the cases in which the juvenile was reasonably likely to commit crimes that would harm others or the child. A process implementing that justification would detain only those children reasonably likely to commit crimes; it is entirely appropriate to require individualized hearings before detaining a child based on the inherently predictive and stigmatic determination that the child would commit crimes if released. By contrast, detention is justified here by the absence of related adults to whom the child may

Second, it is difficult to understand the basis for the court of appeals' conclusion that the Constitution requires a second probable-cause determination even in the absence of a request. As discussed above, the regulations put the child in contact with a responsible adult and require that the child specifically be advised of his right to a hearing in a language he understands. 8 C.F.R. 242.2(g); 242.24(g) and (h). In light of the civil nature of deportation, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984),²³ and the previous determination of the examining officer on which the detention rests, we believe that the Constitution clearly permits a waiver of this hearing. Compare *Fare v. Michael C.*, 442 U.S. 707, 726-727 (1979) (holding that a child may waive *Miranda* rights).

3. The importance of the issues presented by this case justifies plenary review by this Court. The court of appeals has forbidden enforcement of INS policies governing unaccompanied minors on constitutional grounds. To state the obvious, Congress and the Attorney General accordingly are powerless to correct the Ninth Circuit's error. In the absence of this Court's review, the United States will be compelled to release children into the custody of unrelated adults,

be released. There is no reason to believe that full-blown individualized hearings are necessary for INS to determine accurately whether there are in fact related adults seeking custody of the child. Moreover, the child can seek a hearing under 8 C.F.R. 242.2(d) at any time if he believes INS has erred in making that determination.

²³ See *Gerstein*, 420 U.S. at 125 n.27 (suggesting that its holding would not apply in civil cases because it was limited to the "wholly different context of the criminal justice system").

notwithstanding the obvious risks such a course poses to the children's safety and welfare.

Although the district court's order directly affects only the Western Region of INS (California, Hawaii, and Arizona), it imposes a considerable administrative burden. INS advises us that, during the 22-month period during which it complied with the district court's order pending appeal, approximately 1700 hearings (almost three a day) were held for children detained pending deportation. Nor has the problem of deportable children diminished in the interim; in 1991, INS detained 7225 alien children in the Western Region alone. Indefinite compliance with the order would require a serious diversion of resources from INS's responsibilities to administer and enforce the immigration laws.

Finally, it would serve no purpose for this Court to defer review until other circuits have had an opportunity to consider the constitutionality of the regulation at issue. The Ninth Circuit—which by itself covers a substantial portion of the operations of the Service—already has considered the issue *en banc*. In addition, the opposing modes of analysis have been fully developed in seven separate opinions, spanning 144 pages of the appendix, authored by the thirteen judges who have now considered the issues presented. We accordingly believe the issue is ripe for review by the Court at this time.

* * * * *

At the heart of the court of appeals' decision is the unstated premise that the Constitution prohibits the federal government from making the substantive determination that, until the INS finds a related adult or guardian, or completes their deportation proceedings, unaccompanied alien children are better off if

they remain in child-care centers monitored by the government than if they are turned over to unrelated adults. In light of the strong tradition in this country permitting governments to intervene to protect children whenever "parental control falters," *Schall*, 467 U.S. at 265, and to entrust the formulation of policies governing aliens to the "political branches of the Federal Government," *Mathews v. Diaz*, 426 U.S. at 81, this far-reaching conclusion is manifestly incorrect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1991

91-905

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Supreme Court, U.S.

FILED

DEC 9 1991

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

**WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS**

v.

JENNY LISETTE FLORES, ET AL.

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CORRECTED COPY

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-6249
D.C. No. CV-85-4544-RJK

**JENNY LISETTE FLORES, A MINOR, BY NEXT FRIEND MARIO
HUGH GALVEZ-MALDONADO; DOMINGA HERNANDEZ-
HERNANDEZ, A MINOR, BY NEXT FRIEND JOSE SAUL MIRA;
ALMA YANIRA CRUZ-ALDAMA, A MINOR, BY NEXT FRIEND
HERMAN PERILOLO TANCHEZ, PLAINTIFFS-APPELLEES**

v.

**EDWIN MEESE, III; IMMIGRATION & NATURALIZATION
SERVICE; HAROLD EZELL, DEFENDANTS-APPELLANTS**

**Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding**

**Argued En Banc and Submitted April 18, 1991
Pasadena, California
Filed August 9, 1991**

OPINION

**Before: Wallace, Chief Judge, Tang, Schroeder, D.W.
Nelson, Canby, Norris, Wiggins, Brunetti, Thompson,
Leavy, and Rymer, Circuit Judges.**

(1a)

Opinion by Judge Schroeder; Concurrence by Judge Tang; Concurrence by Judge Norris; Partial Concurrence and Partial Dissent by Judge Rymer; Dissent by Judge Wallace, with whom Judges Wiggins, Brunetti and Leavy join.

OPINION

SCHROEDER, Circuit Judge:

I. INTRODUCTION

This is a class action challenging an INS policy that requires governmental detention of children during the pendency of deportation proceedings. That policy is now codified at 8 C.F.R. § 242.24 (1988). Detention is required unless there is an adult relative or legal guardian available to assume custody, even where there is another responsible adult willing and able to care for the child and able to ensure the child's attendance at a deportation hearing. The INS acknowledges that the regulation is not necessary to ensure such attendance. It does not contend that the release of children so detained would create a threat of harm to the children or to anyone else.

The district court held that a blanket detention policy in such circumstances is unlawful. It entered an order that required, where feasible, release to a responsible party of children who would otherwise have been released if a parent or other relative had come forward. The order further required an administrative hearing for each child to determine whether, and under what conditions, the child should be released.

The INS and Attorney General appealed and a divided panel reversed the district court's holding that the detention policy was unlawful. The panel remanded for the district court to determine what procedural protections

would be appropriate under *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether there was sufficient cause to detain a juvenile pending further proceedings. A majority of active judges voted to rehear the case en banc because of the importance of the issues involved and the impact of the policy on large numbers of children arrested as illegal aliens in the Western United States. We now affirm the district court's order.

II. BACKGROUND

This case concerns the treatment of children who are arrested on suspicion of being illegal aliens but who have not yet been determined to be deportable. Because the children are persons present in the United States they must be afforded procedural protections in conjunction with any deprivation of liberty. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

Plenary authority to determine what categories of aliens may lawfully reside in the United States and what categories must be deported resides in the Congress. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Congress has delegated the duties of the administration of the immigration laws to the Attorney General, who oversees the work of the Immigration and Naturalization Service. 8 U.S.C. § 1103(a) (granting the Attorney General authority to "establish such regulations . . . , as he deems necessary" to administer and enforce the immigration laws).

Only one relevant statutory provision addresses the release or detention of aliens between the time of their arrest and the determination of deportability or non-deportability. That statute is 8 U.S.C. § 1252(a)(1), which in all material respects has remained the same for the last four decades. It presently provides:

Pending a determination of deportability . . . [an] alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . . [A]ny such alien . . . may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

To implement this statute, the Attorney General promulgated regulations in 1963, which are still in effect, providing that aliens arrested on the suspicion of deportability could be released until further proceedings upon a determination that such release was appropriate, and under conditions determined by the INS. 8 C.F.R. § 242.2(c)(2). Upon request, an alien is entitled to a hearing before a disinterested officer, an immigration judge, to determine eligibility for release. 8 C.F.R. § 242.2(d).

In 1984, the Western Region of the INS adopted a separate policy for minors. That policy provided that minors would be released only to a parent or lawful guardian. In his memorandum implementing this policy, former Western Region Commissioner Harold Ezell stated that the limits on release were "necessary to assure that the minor's welfare and safety is maintained and that the agency is protected against possible legal liability." The policy also provided for release to another responsible adult "in unusual and extraordinary cases, at the discretion of a District Director or Chief Patrol Agent." The Regional Commissioner did not refer to any problems that had arisen under existing regulations. He did not cite any instances of harm which had befallen children released to unrelated adults, nor did he make any reference to suits that had been filed against the INS arising out of allegedly

improper releases. It has remained undisputed throughout this proceeding that the blanket detention policy is not necessary to ensure the attendance of children at deportation hearings.

Implementation of this policy sparked concern in a number of quarters because the policy resulted in the governmental detention of a large number of children who posed no apparent risk to the community and whose presence at their respective hearings could be ensured by responsible individuals. Various individuals and groups, including many appearing as amici in this rehearing en banc, were among those who reacted adversely to the new policy. These included church groups, Amnesty International, Lawyers' Committee for Human Rights, International Human Rights Law Group and Defense for Children International.

During the course of this litigation, the INS codified the regional policy into the nationally applicable regulation now at issue. In promulgating that regulation, the INS did not refer to any particular problem that had arisen in the course of administering the immigration laws as they affected children. Rather, it simply cited the "dramatic increase in the number of juvenile aliens" found unaccompanied by a parent, guardian or a [*sic*] adult relative. 53 Fed. Reg. 17,449 (May 17, 1988). The regulation allows release to a somewhat broader class of people than did the Western Region policy, i.e., a variety of adult relatives as opposed to just parents and legal guardians, but it prohibits release in cases where other responsible adults are available to take custody of the minor. It permits release to unrelated adults only in unusual and compelling circumstances." 8 C.F.R. § 242.24.¹

¹ The regulation provides in full as follows:

Detention and release of juveniles.

In promulgating the regulation, the INS recognized that the principal factor bearing on release or detention is the

(a) *Juveniles.* A juvenile is defined as an alien under the age of eighteen (18) years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines.

(1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others.

In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile had identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

• • •

likelihood of appearance at future proceedings. It also recognized that the policy of preventing release to responsible adults was not related to the issue of flight risk or the administration of any provision of the immigration laws. Its principal justification for the detention rule was the theory that unless the INS were able to do a comprehensive "home study" of the proposed custodian, the child's own interests would be better served by detention. The INS stated:

As with adults, the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings. However, with respect to juveniles a determination must also be made as to whose custody the juvenile should be released. On the one hand, the concern for the welfare of the juvenile will not permit release to just any adult. On the other hand, the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released.

53 Fed. Reg. at 17,449.

In response to comments suggesting that release to responsible adults should be permitted on a regular basis, the INS stated that it did not have the resources or expertise necessary to make a determination, in each case, whether release to the adult in question would be in the child's best interests. 53 Fed. Reg. at 17,449. The INS did not state any basis for its assumption that home studies would have to be conducted. Nor did the INS indicate that it had conducted such studies before releasing children to unrelated adults prior to the promulgation of this policy. Commenters also complained that the regulation's provision that release to unrelated adults could occur in "unusual and compelling circumstances" was too vague to provide meaningful guidance. The INS responded that

such vagueness was deliberate, designed to provide "the broadest possible discretion" to INS officials. *Id.* Finally, commenters suggested that the INS should permit individuals or organizations to act as intermediaries between the INS and the parent or guardian of an alien child, to allow for release where that parent or guardian is afraid to come forward personally because of his or her own illegal alien status. After pointing out that "[t]his proposal raises some of the same concerns that release to any reliable adult raises, for example, the inability of the Service to perform "home studies," the INS concluded that it would "continue to consider the proposal," but would promulgate the regulation without such a provision at this time. *Id.* at 17,450. The final regulation was approved on May 17, 1988.

The named plaintiffs, including named plaintiff Jenny Flores, filed the action on July 11, 1985, challenging the Western Region's policy then in effect. These named plaintiffs represented a class of minors who do not pose a risk of flight or harm to the community, and have responsible third parties available to receive them, and are thus being detained only because no adult relative or legal guardian is available to take custody of them. Their complaint contained a number of claims. In the panel majority opinion, Judge Wallace described them as follows:

The first claim alleged that the Western Region's bond release condition violated the Immigration & Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. § 552 *et seq.*, the fifth amendment's due process clause and equal protection guarantee, and international law. Flores's second claim challenged the INS's failure to provide (1) "prompt written notice" to the detainee that the bond release condition had been imposed,

and (2) "prompt, mandatory, neutral and detached" review following arrest of (a) whether probable cause to arrest existed, (b) whether imposition of the bond condition was necessary to ensure future appearance, and (c) whether any available adult was suitable to ensure the detained juvenile's well-being and appearance at future proceedings. The second claim alleged that these failures violated due process and international law. Plaintiffs' last five claims, which challenged various conditions of the minors' confinement, . . . were resolved by settlement or motion. . . .

Flores v. Meese, No. 88-6249, slip op. 10747, 10764-65 (9th Cir. Sept. 7, 1990) (as amended). After the policy originally in question was codified as a regulation, this litigation was maintained as a challenge to that regulation.

Between the time that the complaint was filed and the promulgation of the national regulation implementing the Western Region policy, the district court disposed of several motions. With respect to the limitation on release to parents or legal guardians, the court ruled the provision violated equal protection. It agreed with Flores that the INS' practice of permitting alien minors in exclusion proceedings to be released to a broader class of adults than those in deportation proceedings was not supported by a rational justification. See 8 C.F.R. § 212.5(a)(2)(ii) (1987) (alien minors in exclusion proceedings could be released to adult relatives or to non-relatives). When the INS promulgated the regulation here at issue, it amended the regulation regarding release of children in exclusion proceedings to incorporate by reference the same restrictions as those operative in the deportation context, thus mooting the district court's ruling on this issue. See 8 C.F.R. § 212.5(a)(2)(ii) (1988). The court still had under advisement various motions relating to the procedural implementation of the INS' policy when the INS promulgated the official regulation.

Upon promulgation of the regulation, the district court asked for supplemental briefs and then entered an order granting summary judgment to the plaintiff class. The order invalidated the blanket detention of minors where a responsible adult could ensure attendance at the deportation hearing, and it required a hearing before a neutral and detached official in each case to determine whether release was appropriate and the conditions of release. The order provided:

1. Defendants . . . shall release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party. Prior to any such release, the defendants may require from such persons a written promise to bring such minor before the appropriate officer or court when requested by the INS.

2. Whenever a minor is released as aforesaid, the minor shall be promptly advised in writing in a language he understands of any restrictions imposed upon his release.

3. Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor.

The Attorney General and INS appealed. The majority of the panel for our court vacated the first paragraph of the district court's order, holding that the detention policy did not implicate any of the plaintiffs' fundamental rights, and that due deference to the INS' choices in implementing congressional immigration policy required approval of the INS detention policy restricting release. The majority characterized the right claimed by the class as a substan-

tive due process right "to be released to an unrelated adult." Slip op. at 10788. Finding that the Constitution does not guarantee such a right, the majority applied a highly deferential standard of review to what it saw as an exercise of the INS' unique expertise and authority.

In considering the procedural aspects of the district court's order as embodied in paragraph three, the panel majority remanded. It rejected the appellees' contention that the fourth amendment requirement of review by a neutral and detached magistrate of probable cause for arrest, as the Supreme Court has enunciated in *Gerstein v. Pugh*, 420 U.S. 103 (1975), was applicable in the context of civil deportation proceedings. Rather, it chose as the appropriate model for procedural due process evaluation the balancing test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976). That test would involve a balancing of the children's interest in release to a responsible adult, which the majority viewed as not constitutionally protected, against the governmental interests, which it viewed as entitled to substantial deference.

Judge Fletcher, in dissent, described the case as "among the most disturbing I have confronted in my years on the court." Slip op. at 10803. She characterized the district court's order as a "simple, sensible, minimally intrusive direction," *id.* at 10804, to protect the fundamental liberty interests of the plaintiffs who, in her view, should not be denied liberty when their "only possible offense is their alienage." *Id.* at 10803.

In their petition for rehearing en banc, plaintiffs contend, inter alia, that the panel majority erred in failing to recognize their fundamental interest in liberty. It also erred, they argue, in holding that, under either *Gerstein v. Pugh* or *Mathews v. Eldridge*, any procedure other than an individual hearing before an independent officer could provide adequate protections for the right at stake.

Before us for decision are three principal sets of issues. The first involves the detention policy itself and whether it affects any constitutionally protected liberty interests of the plaintiffs. The second involves the nature of the federal governmental interest furthered by such a policy, the justifications set forth by the agency for such a policy and the extent to which we must defer to the agency in the promulgation of such policies. The third is whether, after examination of these issues, the appropriate procedural model for the determinations at issue is the criminal model of *Gerstein v. Pugh* or the civil model of *Mathews v. Eldridge*, or indeed whether, in the context of this case, it makes any difference whether a criminal or civil model is chosen. Our discussion focuses on each of these areas in turn.

III. DISCUSSION

Defendants maintain that the plaintiffs' liberty interests are limited because of their status as aliens and children. We therefore examine in some detail the manner in which courts and Congress deal with the questions of rights of aliens and children.

A. Plaintiffs' Interests as Aliens

The Constitution protects the rights of aliens to due process and equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Even illegal aliens enjoy the due process protections of the fifth amendment. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). It is now well established that under these cases any person present in the United States is entitled to equal justice before the law, including procedural protections in conjunction with any deprivation of liberty, and freedom from invidious discrimination. See C. Antieau, 1 *Modern Constitutional Law* §§ 9:25-9:27 (1969 & Supp. 1991).

A crucial component of the right to personal liberty is the ability to test the legality of any direct restraint that the government seeks to place on that liberty. This ability is guaranteed through the availability of the writ of habeas corpus to challenge the lawfulness of one's imprisonment. The right to seek such a writ has its roots in English law that predates the formation of this nation. See Habeas Corpus Act of 1679, 31 Car. II Ch. 2. It was incorporated among the first rights guaranteed by the United States Constitution. U.S. Const. art. I, § 9. There thus can be no question that this right is a key part of the American legal system.

In any discussion of the constitutional guarantee of liberty, the importance of habeas corpus must not be understated. As one commentator has described it:

Over the centuries habeas corpus has been the common-law world's "freedom writ" by whose process the courts may require the production of all prisoners and inquire into the legality of their incarceration, failing which they have been set free. Of the writ of habeas corpus, the United States Supreme Court has appropriately noted: "There is no higher duty than to maintain it unimpaired."

1 *Modern Constitutional Law* § 5:148 at 436 (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)). For this reason, to assess the nature of an alien's liberty interest, it is appropriate to look to the extent courts have historically recognized such an interest through habeas corpus proceedings.

It has long been accepted that alienage does not prevent a person from testing the legality of confinement through habeas corpus. See *Wong Wing v. United States*, 163 U.S. 228 (1896). Indeed, even a would-be immigrant who is prevented from landing in the United States and is, in that

way, deprived of liberty "is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). Thus, the status of the plaintiff class in this case as aliens whose presence in this country might be illegal does not affect their right to put the government to its proof concerning the legality of their detention.

That the detention at issue here is a civil detention imposed in the course of administering the immigration laws does not alter the relevance of the principles of *habeas corpus*. Still the leading case involving a test of the legality of detention under immigration laws is *Carlson v. Landon*, 342 U.S. 524 (1952). In that case, the Supreme Court dealt with a petition for *habeas corpus* by aliens detained prior to deportation under the Internal Security Act of 1950, because of their membership in the Communist Party of the United States. Noting that "[d]eportation is not a criminal proceeding" and thus the detention at issue was administrative, not punitive, 342 U.S. at 538, the Court nevertheless employed *habeas corpus* review as the appropriate means for the individual aliens to challenge their detention.

The petitioners in *Carlson* challenged their pre-deportation detention on the ground that there had been no sufficient showing that they presented an actual risk of flight or harm to the community if released pending further proceedings. Rather, they were denied release on a finding that each was an active member of the Communist party. This finding, they argued, was not sufficient to support detention. See 342 U.S. at 533-34.

The Court rejected this argument on the ground that the decision to detain them based on their active membership in the Communist party was made through an exercise of the discretion delegated to the Attorney General under the immigration laws. The delegated discretion was to deter-

mine which aliens pose a threat of harm to the community. The Court held that detention based on Communist party membership and activity was not an abuse of that discretion. The Court noted that the evidence went "beyond unexplained membership and show[ed] a degree . . . of participation in Communist activities." 342 U.S. at 541. Because the Court also agreed with the INS that "the doctrines and practices of Communism clearly enough teach the use of force to achieve political control," *id.* at 535-36, it found that the detention of the petitioners was proper since they posed "a menace to the public interest." *Id.* at 541.

The Court was careful to observe, however, that the discretion of the Attorney General was not without bounds. The INS policy in *Carlson* did not amount to blanket detention. The Court pointed out that there was "no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail." *Id.* at 541-42. It went on to note that the evidence before it indeed illustrated that release pending further proceedings was granted "in the large majority of cases." *Id.* at 542.

The most recent comprehensive Supreme Court discussion of an individual's interest in liberty is set in the context of adults held in pretrial detention without regard to citizenship. *United States v. Salerno*, 481 U.S. 739 (1987). The Court there recognized "the individual's strong interest in liberty," which it characterized as a "fundamental" right with which Congress could interfere only with a "careful delineation of the circumstances under which detention will be permitted. . . ." 481 U.S. at 750-51. Detention was justified only by clear and convincing evidence that the arrestee presented "an identified and articulable threat to an individual or the community. . . ." *Id.* at 751. Significantly, the Court drew a parallel between the detention at issue in *Carlson* and that challenged in *Salerno* by noting that

the *Carlson* petitioners were permissibly detained during the pendency of deportation proceedings because they were "potentially dangerous." 481 U.S. at 748. It did not in any way suggest that aliens' liberty interests were any less fundamental than those of citizens.

History may have passed *Carlson* by in some respects, particularly in its assessment of the danger attending political activity, but the case, in significant respects relevant to this case, provides guidance. *Carlson* holds that under our Constitution and an Immigration Act materially the same as the current one, the INS cannot detain individuals without a particularized exercise of discretion through which it determines that detention of an individual would prevent harm to the community or further some other important governmental interest Congress has delegated to the INS. See also C. Gordon and S. Mailman, 1 *Immigration Law and Procedure* § 1.03[7][d] (1988) ("the alien in deportation proceedings may be detained or required to post bond only upon a finding that he is a threat to the national security or likely to abscond.").

Thus, we must hold that aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest. That right is secured by the Constitution in its enumerated guarantee of habeas corpus to all individuals, including aliens, to test the validity of their detention through judicial scrutiny of the basis for confinement at the hands of the government. See *Salerno*, 481 U.S. 739; *Carlson*, 342 U.S. 524; *Wong Wing*, 163 U.S. 228.

B. Plaintiffs' Interests as Children

The plaintiffs are not only aliens; they are also minors. The INS contends that this factor materially changes the nature of their liberty interest, thereby rendering the

detention policy reasonable and appropriate. We therefore turn to the question of what effect the juvenile status of these plaintiffs may have on the analysis of their liberty interests and the protections that must be given to those interests.

The Constitution protects the rights of children to due process of law in conjunction with any deprivation of liberty. *In re Gault*, 387 U.S. 1 (1967). While a child accused of an offense may be subject to pretrial detention based on a determination that release is not safe for the child, such a determination has been held to meet the mandates of due process only where made by a neutral and detached official, with the justifications for detention clearly stated. *Schall v. Martin*, 467 U.S. 253 (1984). This holding is in keeping with the general rule that freedom from institutional confinement should be the norm, from which any deviation must be supported with specific reasons. As one set of commentators has observed, a child's "right to be treated in the manner least restrictive to the child's liberty . . . has its roots in the well-settled concept that, while constitutional rights may be restricted by the state for legitimate purposes, the restriction must be no greater than necessary to achieve these purposes." R. Horowitz and H. Davidson, *Legal Rights of Children* § 10.10 at 431 (1984). This proposition flows from the Supreme Court's general pronouncement that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (footnotes omitted). Under these principles, governmental confinement of a child to an institution should be a last resort.

Policies constructed to deal with the confinement of children at both the state and federal levels have recognized the practical need to avoid institutional detention where less restrictive means are available. It is the states, rather than the federal government, which are primarily responsible for child welfare issues. State courts have articulated the view that institutional confinement should be used only when another type of placement such as foster care is not possible. *See, e.g., R.P. v. State*, 718 P.2d 168 (Alaska App. 1986) (state must prove by a preponderance of the evidence that less restrictive alternatives are not possible); *In re John H.*, 48 A.D.2d 879, 369 N.Y.S.2d 196 (1975) (other options must first be fully explored). In addition to protecting any constitutional interests of the children, this avoidance of institutionalization is seen to serve their best interests. *See generally* S. Davis, *Rights of Juveniles* § 6.3 (1990) (discussing states' attempts to ensure that a child benefits in some way from whatever type of placement is ultimately chosen).

Congressional policy, where relevant, also favors avoidance of the institutionalization of juveniles. The federal government does have the occasion to process juvenile offenders when, for example, they violate federal laws or commit crimes on Indian reservations. In such situations, the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq.*, governs the treatment of the offenders. That Act's provisions regarding detention specify that it should occur in "a foster home or community based facility" instead of an institution, if possible. 18 U.S.C. § 5035 (regarding pre-disposition detention); 18 U.S.C. § 5039 (regarding detention after disposition). These provisions evidence an understanding that the juvenile's liberty should be curtailed only by the least restrictive means necessary to achieve the purpose at hand, and that the interests of

juveniles and of society are best served by keeping such offenders in homes rather than in institutions whenever practicable.

The foregoing analysis compels the conclusion that, just as the plaintiffs' entitlement to liberty absent a valid, particularized basis for confinement does not diminish due to their alienage, their minority does not materially change the nature of that entitlement. The INS is therefore incorrect when it asserts that plaintiffs have no fundamental liberty interest at stake. The INS is also incorrect in asserting that to prevail, the plaintiffs must be able to find in the Constitution itself, or law interpreting the Constitution, an express recognition of a "substantive due process right to be released to an unrelated adult." Such release is not the constitutional interest being secured. It is the remedy the district court imposed after ruling that the defendant's policy unconstitutionally interfered with plaintiffs' interest in freedom from unjustified governmental detention.

Whether the imposition of such a remedy was appropriate depends upon whether the detention serves a significant federal governmental purpose. It is to that issue that we now turn.

C. Government Purposes Involved

This case is unprecedented in that it involves post-arrest detention of persons who have not been convicted of any crime, do not pose a risk of flight, and who have not been determined to present any threat of harm to themselves or to the community. Whatever purposes detention serves, they do not relate to punishment, to the need for attendance at further proceedings, or to avoidance of an identifiable risk of harm. *Contrast Salerno*, 481 U.S. 739; *Schall*, 467 U.S. 253; *Carlson*, 342 U.S. 524.

The INS articulates two reasons for the detention. First, the INS suggests that the child's interests would be better served by detention than by release to a responsible adult whose living environment the INS does not have the means to investigate. Second, it asserts that the policy is necessary to protect it from potential liability in the event some harm should befall the child after release.

The INS does not articulate any legal basis for its position that these are valid INS concerns. The first flies in the face of the Supreme Court's ruling in *Gault* that children should be treated in a manner least restrictive of liberty. It also expresses a view contrary to the Supreme Court's decision in *Schall*, which required a foreseeable risk of harm to justify detention. While the Supreme Court in *Schall* recognized that a child, because of a lack of maturity, should have some adult custody and care, 467 U.S. at 265, it did not remotely suggest that there may be a presumption in favor of governmental detention as serving the best interests of the child.

The INS in essence maintains, however, that we should not look behind their articulation of concerns because we must defer to any such articulation. Agencies are, of course, entitled to some deference when they make determinations that relate to an area of their special expertise. See *United States v. Shimer*, 367 U.S. 374, 383 (1961). In the immigration field, then, courts owe deference to decisions of the INS where its special experience and authority in the area of alienage are called into play. See *Carlson*, 342 U.S. at 540-41.

The justifications asserted here, however, relate to child welfare and the potential liability of child welfare agencies. Child welfare is not an area of INS expertise and its decisions in this area are not entitled to any deference. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-15 (1976) (court does not defer to agency determination in area out-

side of agency's expertise). Nor does this policy carry out any express congressional directive. Rather, the policy is contrary to Congress' determination that institutional detention of juveniles is disfavored. See 18 U.S.C. §§ 5035; 5039. One of the very reasons the INS gives for detaining the plaintiffs is that it does not have the expertise, and Congress has not given it the resources, to do the kind of evaluation of foster care facilities that state child welfare agencies do on a routine basis. The INS reasons that since it is unable to do such an evaluation, the best interests of the child must lie in detention rather than in release. The Constitution requires the opposite conclusion. See *Gault*, 387 U.S. 1. We therefore hold that the INS may not determine that detention serves the best interests of members of the plaintiff class in the absence of affirmative evidence that release would place the particular child in danger of some harm.

Our conclusion that the INS cannot maintain a blanket policy of detention thus does not absolve the INS from the responsibility of making individualized decisions concerning the fate of children it has arrested. Due process requires a particularized exercise of discretion in conjunction with the decision to grant or deny release to any alien. See *Carlson*, 342 U.S. at 542. It is, of course, within the purview of the INS to determine whether or not the person available to assume custody will ensure the child's attendance at future proceedings. It is also within the purview of the INS to determine on the basis of the particular case whether release of the child poses a danger to the community or could result in harm to the child. The blanket refusal to make individualized determinations in the guise of administrative expediency, however, cannot pass constitutional muster. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (administrative convenience does not justify a policy that otherwise runs afoul of the Constitution).

The INS' secondary justification for its detention policy is that if it released a child to an unrelated adult based on a determination short of a detailed "home study," it could be subject to liability in the event that some harm befell the child. The INS does not specify the source of such liability.

We find little indication that the INS would be subject to liability for releasing a minor to an unrelated adult without a "home study." Such a "study" is concededly beyond the expertise of the Service. The Supreme Court's holding in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), would give an individual a cause of action against the INS for a violation of constitutional rights, an action analogous to the cause of action available through 42 U.S.C. § 1983 against those who violate federal rights under color of state law. The Supreme Court has recently held, however, that a state agency, with far more expertise in child welfare than the INS, could not be held liable under section 1983 for allowing a child to remain in the custody of an adult despite clear evidence that such custody placed the child in danger. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The Court concluded that the actions of a private citizen could not form a basis for liability of the Department under section 1983. It did not matter, the Court held, that the child had formerly been in state custody, because "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *Id.* at 201.²

² A state would of course face a somewhat greater threat of liability after releasing a child to the custody of a responsible third party as opposed to the custody of a parent as in *DeShaney*. This is because the state would have acted affirmatively to place the child in a home from which the child had not originally come, as opposed to returning the

Decisions before and since *DeShaney*, as well as *DeShaney* itself, compel the conclusion that governmental agencies face far greater exposure to liability by maintaining a special custodial relationship than by releasing children from the constraints of governmental custody. See *DeShaney*, 489 U.S. at 200-201 (emphasizing that absence of duty on the part of the state to ensure child's safety arose from the fact that the plaintiff was not in the state's custody at the time of the injury); *Youngberg v. Romeo*, 457 U.S. 307, 316-17 (1982) (when individual is in state custody, state may acquire constitutional duty to ensure individual's safe care); *Lashawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991) (under *DeShaney* and *Youngberg*, state agency may be liable for constitutional tort where it fails to provide adequately for the safety and well being of children in its custody). We reject the INS' claim that it must detain these children to avoid lawsuits. In so doing, we follow the lead of the Supreme Court, which has recently refused to uphold an argument that possible tort liability justified a policy that violated the rights of individuals, where such liability was "remote at best." *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1208 (1991).

We therefore conclude that the first paragraph of the district court's order is an appropriate means to prevent incarceration of juveniles where such incarceration serves no legitimate purpose of the INS. It provides that release to a responsible adult shall occur only if the child would have otherwise been eligible for release to a relative under the challenged policy. It takes into account the need to secure attendance at immigration proceedings, and does not fore-

child to the same home and assuring placement in "no worse position than that in which he would have been had [the state] not acted at all." *Id.* at 201.

close the ability of the INS to order detention if there are other, valid reasons for detention. In addition, by specifying that where there is no relative or legal guardian available release may be made to a "responsible" party, it allows room for the INS to make the necessary determination of whether a party who is willing to assume custody of the child is fit to do so.

D. Procedural Due Process and Part Three of the District Court's Order

From the beginning of this litigation the parties have disputed whether the determination of what process is due in conjunction with the decision to detain members of the plaintiff class should be made pursuant to *Gerstein*, 420 U.S. 103, or *Mathews*, 424 U.S. 319. In *Gerstein*, the Court determined that a "timely judicial determination" was a mandatory prerequisite to pretrial detention in the criminal context. 420 U.S. at 126. In *Mathews*, the Court articulated a three-factor analysis designed to be applicable generally to questions of due process in conjunction with administrative actions. A reviewing court must consider first the private interest that the action affects, second the risk that the procedures currently utilized will result in an erroneous deprivation of that interest and the extent to which that risk could be lessened by the addition of more safeguards, and third the government's interest in maintaining the current procedures. 424 U.S. at 335. The plaintiffs have urged that *Gerstein* be followed, while the INS has argued that *Mathews* provides the proper mode of analysis.

Because we have held that the plaintiffs' interest in freedom from detention requires that the decision to detain be made only in conjunction with a neutral and detached determination of necessity, we must affirm Part Three of

the district court's order regardless of whether we apply *Mathews* or *Gerstein*. In so doing, we note that under current regulations, the INS is already required to maintain the mechanisms for providing review by an Immigration Judge of any decision to detain an alien or of conditions imposed on the release of such alien, if the alien requests such a hearing. See 8 C.F.R. § 242.2(d). The only new requirements that Part Three of the district court's order places on the INS are that, if the alien is a child, such a hearing must be held regardless of whether the alien requests it, and the determination at the hearing must include an inquiry into whether any non-relative who offers to take custody represents a danger to the child's well being. The first of these additional requirements is reasonable because the members of the plaintiff class, as children, are less capable than others of understanding what they are waiving by failing to request a hearing. The second is reasonable in light of the private interest at stake. We therefore conclude that Part Three of the district court's order provides the appropriate procedural safeguards for the deprivation here at issue, and accordingly uphold it.

IV. CONCLUSION

The district court correctly held that the blanket detention policy is unlawful. The district court's order appropriately requires children to be released to a responsible adult where no relative or legal guardian is available, and mandates a hearing before an immigration judge for the determination of the terms and conditions of release.

The majority panel opinion is VACATED and the order of Judge Kelleher is AFFIRMED in all respects.

TANG, Circuit Judge, concurring:

I concur wholeheartedly in the majority's judgment and I concur in the majority opinion insofar as it goes. I write separately to emphasize my belief that the liberty interest at issue—freedom from governmental detention and restraint—is a fundamental right expressly protected by the fifth amendment to the Constitution. Indeed, freedom from governmental restraint is the core, the very crux of any governmental system dedicated to preserving the integrity and inviolability of the individual. I write separately also to highlight the two distinct deprivations of liberty occasioned by the INS's policy.

A. *The Right at Issue*

The original panel opinion in this case and the current dissent denominate the right at issue as the “right to be released to unrelated adults.” This characterization of the children's liberty interest stands the Constitution on its head. It presumes the government's right to detain and requires children, who have committed no offense greater than being *suspected* of being deportable, to prove their entitlement to release. Even assuming that non-textual rights need to be carefully articulated, there is no reason to afford “liberty”—language right out of the Constitution's text—such a cramped interpretation.

I agree with the majority's conclusion that one textual source of the right to freedom from governmental restraint is the Constitution's habeas corpus guarantee. U.S. Const. art. I, § 9. The majority's analysis of the constitutional basis for the right at issue is not complete, however.

Physical freedom from governmental detention and restraint—liberty in its most elemental form—is a fundamental constitutional right guaranteed by the due process

clause of the fifth amendment. This freedom from governmental restraint is both a substantive right and an entitlement to certain procedural protections when the government acts to deprive a person of physical liberty.

A recent acknowledgement of the substantive due process right to freedom from governmental restraint can be found in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). In *DeShaney*, the Supreme Court expressly stated:

In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause.

Id. at 200.

The *DeShaney* court's observation was not novel. Numerous precedents already recognized the individual's fundamental right to freedom from restraint. *See, e.g., United States v. Salerno*, 481 U.S. 739, 749 (1987) (“Respondents [invoke] . . . the ‘general rule’ of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Such a ‘general rule’ may freely be conceded. . . .”); *Youngberg v. Romeo*, 457 U.S. 307, 309, 316, 319 (1982) (Court recognizes “substantive right[] under the Due Process Clause” to “freedom from bodily restraint” and observes that “[i]n other contexts, the existence of such an interest is clear in the prior decisions of this Court. Indeed, ‘[l]iberty from bodily restraint always has been recognized as the core of liberty protected by the Due Process Clause from arbitrary governmental action,’ ” (quoting *Greenholtz v. Inmates, Nebraska Penal & Correctional Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dis-

sending in part)); *Parham v. J. R.*, 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.").¹

These cases recognize explicitly what our constitutional jurisprudence historically has acknowledged implicitly through presumptions and assumptions about the relationship between government and the governed in this country. Liberty is the norm; arrest, detention, or restraint by the state is the exception. To operate otherwise makes a mockery of "government of the people, by the people." Some of our most cherished rights—freedom of speech and of religion, the right to vote, travel, and to be free from unreasonable searches and seizures—would mean nothing if we had to live under the heavy hand of government.

The strict burdens that the Constitution imposes on government's efforts to deprive individuals of their liberty reveal that freedom from governmental restraint is a fundamental right and the cornerstone of democratic government. Government may not incarcerate a person unless it proves that person's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Government may not arrest and detain persons absent probable cause to believe a crime has been committed by them. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). The brief delay in physical freedom occasioned by a stop-and-frisk cannot be imposed absent a reasonable and particularized suspicion of danger. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The

¹ Indeed, the Supreme Court's recent opinion in *Cruzan v. Director, Missouri Dep't of Health* implicitly acknowledges this substantive right when it affirms the individual's right, under the due process clause of the fourteenth amendment, to refuse unwanted medical treatment. ____ U.S. ____, 110 S. Ct. 2841, 2851 (1990).

operative assumption in our society is that government may not intrude into the private sanctuary of the individual. Exceptions will be made if, and only if, the state makes a very strong showing of necessity.

To reduce liberty, as the original panel and the dissent suggest, to nothing more than an entitlement to certain procedural protections and thereby to burden the children with showing a "right to release" ignores the very substance of the Bill of Rights. The Bill of Rights, including the fifth amendment, is our country's blueprint for individual freedom. It maps out limits beyond which the government may not step. Our conception of liberty should thus be drawn in terms of what government may not do (restrain) rather than in terms of what children must do (show entitlement to release).

To see the right in strictly procedural terms fails to recognize that the genesis of these procedures and presumptions is our Constitution's fundamental belief in the sovereignty of the individual. It is this principle that defines the substantive right to liberty, to freedom from government restraint. The rules and presumptions mandated by procedural due process are not themselves "liberty." Rather, they are the indispensable guarantees and requirements of the substantive right to freedom from governmental restraint. Liberty under the due process clause is thus both a process and a condition, and it is a right with which the children who brought this action are endowed.²

² The dissent and the original panel attach significant weight to Justice Scalia's statement in *Cruzan*, ____ U.S. at ____, 110 S. Ct. at 2859 (Scalia, J., concurring), that the due process clause "does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty 'without due process of law.'" Yet no other member of the Supreme Court joined Justice Scalia's straitened reading of the fifth amendment.

B. Procedural Due Process

Defining the right at issue only begins our constitutional inquiry. That a right is fundamental does not mean that it is inviolable. See, e.g., *Youngberg*, 457 U.S. at 319-20 (liberty interest protected by substantive due process is not absolute). Just as government may on occasion limit speech or religious practices, so may government restrict or deny physical liberty to some extent, upon making the constitutionally-mandated showing of necessity. We thus must determine whether the limitations imposed by the INS on the children's liberty comport with the substantive and procedural components of the fifth amendment's due process clause.

Much of the unease occasioned by the INS's policy and the original panel's opinion derives from the fact that the INS imposes conditions on a child's release before there is even a neutral and independent review of its authority to detain a child (and, concomitantly, to limit her release). This puts the cart before the horse. We cannot fairly discuss the INS's ability to condition the children's release or its interest in ensuring the children's return and safety until the INS has established its authority to detain the children in the first instance. Unlike the majority, I turn therefore to the procedural due process issue before addressing the constitutionality of the release conditions.

Much of the parties' debate focuses on whether *Gerstein v. Pugh*, 420 U.S. 103, or *Mathews v. Eldridge*, 424 U.S. 319 (1976), prescribes the appropriate framework for the procedural due process analysis. I agree with Judge Rymer's conclusion that *Mathews* governs. Deportation is a civil, not a criminal, proceeding. See *Carlson v. Landon*, 342 U.S. 524, 537-38 (1952). The Supreme Court has repeatedly invoked *Mathews* to test the constitutionality of civil deprivations of liberty. See, e.g., *Landon v.*

Plasencia, 459 U.S. 21, 34 (1982) (INS exclusion proceedings); *Parham*, 442 U.S. at 599-600 (commitment of children to mental health facility); *Greenholtz*, 442 U.S. at 14 (parole hearings); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (involuntary commitment of children to mental hospital); *Ingraham v. Wright*, 430 U.S. 651, 675 (1977) (corporal punishment of students); see also *Salerno*, 481 U.S. at 746 (regulatory pretrial detention under Bail Reform Act); accord *Youngberg*, 457 U.S. at 320-21 (involuntarily committed patients). While the children correctly point out that the Court frequently cites *Gerstein* in these cases, the opinions speak, and the analysis is conducted, in the language of *Mathews*. Because the Supreme Court has used *Mathews* to test the propriety of a variety of civil incarcerations, including an INS proceeding, we must apply *Mathews* in this instance.

In applying *Mathews*, we must balance (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail. *Mathews*, 424 U.S. at 335.

The private interest at issue is, of course, the children's liberty from governmental detention and restraint. This interest is substantial and compelling. "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425; see also *Salerno*, 481 U.S. at 750 (noting the "importance and fundamental nature of this right [to liberty]"); *Schall v. Martin*, 467 U.S. 253, 265 (1984).

Moreover, the adverse consequences of detention are legion, consequences exacerbated by the youth of the detainees. Detention by the government stigmatizes children, regardless of the ultimate resolution of their respective cases. Children in INS detention centers enjoy, at best, very limited educational and recreational opportunities. They are away from family and friends; every aspect of their daily life is regulated by strangers. *See Plasencia*, 459 U.S. at 34 (right to regain family "ranks high among the interests of the individual"). They have very little privacy, may be shackled and handcuffed, and lead a very regimented life.

Furthermore, the risk of an erroneous deprivation of liberty by the INS is substantial. As Judge Fletcher pointed out in her dissent from the original panel's decision in this case, many persons arrested by the INS will ultimately prove not to be deportable. Some of these children will be found to be citizens, legal aliens, or entitled to political asylum.

Currently, an officer's determination of deportability is subject only to review by a second immigration officer, who determines whether prima facie evidence of a violation of the immigration laws exists. 8 C.F.R. § 287.3. If no second officer is available, the prima facie determination may be made by the original arresting officer. *Id.* At no point does an official detached from the enforcement function test the sufficiency of the evidence to arrest and detain. *See id.*³

³ This regulation covers arrest of persons without a warrant. The issuance of a warrant is covered by 8 C.F.R. § 242.2(c). These arrest warrants are issued by INS officer, not neutral third parties. Thus even the presence of an arrest warrant does not indicate that the decision to detain has been reviewed by an official independent of the law enforcement function.

The majority correctly notes that a child may have the propriety of her detention or of conditions on her release reviewed by an immi-

Our Constitution has long recognized that combining the roles of prosecutor and adjudicator in a single entity is a recipe for fundamentally unfair and erroneous decision making. *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("an impartial decision maker is [an] essential" component of due process); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) ("A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process."); *see also Parham*, 442 U.S. at 606 (civil commitment of mentally ill children must be reviewed by neutral fact finders); *Gerstein*, 420 U.S. at 114.

These cases recognize the importance of neutral and detached review as a protection against the overzealous prosecutor or law enforcement official.

A democratic society, in which respect for the dignity of all [persons] is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of

gration judge if she specifically requests such as hearing. 8 C.F.R. § 242.2(d). INS officers, however, are not required to inform arrested children of this right. *See* 8 C.F.R. § 242.2(c)(2). This provision thus does nothing to cure the constitutional defect in the INS's procedures. Freedom from governmental restraint is not a right reserved exclusively for those schooled in the intricacies of INS regulations. "No matter how elaborate and accurate the . . . proceedings available under the [regulation] may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place." *Doe v. Gallinoti*, 657 F.2d 1017, 1023 (9th Cir. 1981) (footnote omitted).

soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.

McNabb v. United States, 318 U.S. 332, 343 (1943); see also *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) (probable cause for issuance of an arrest warrant must be determined by an official independent of the police and prosecution); *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) (prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate).

The INS's procedure does nothing to protect against the risk of error and unfairness. The field officer's determination is, at best, reviewed by another law enforcement officer. At worst, the arresting officer reviews his own decision. The INS cites no case, nor have any been found, where the Supreme Court has tolerated a deprivation of physical liberty unaccompanied by any provision for independent and neutral review of the decision to incarcerate. To the contrary, statutory schemes for detention (civil or criminal) previously reviewed by the courts have involved some measure of independent review of the initial decision to detain. See, e.g., *Salerno*, 481 U.S. at 750 (pretrial detention predicated upon governmental showing by clear and convincing evidence to a neutral decisionmaker of need to detain); *Schall*, 467 U.S. at 269-70 (juvenile detention reviewed for probable cause by member of judicial branch); *Parham*, 442 U.S. at 606-07 (commitment of children must be reviewed by a neutral and detached trier of fact); see also *In Re Gault*, 387 U.S. 1, 30 (1967) (child committed to juvenile detention entitled to hearing containing "the essentials of due process and

fair treatment"). Our Circuit's precedent similarly insist upon the neutral review of decisions to retrain individuals for any significant period of time. *Gary H. v. Hegstrom*, 831 F.2d 1430, 1433 (9th Cir. 1987) (due process hearings for adolescents detained for criminal behavior); *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (involuntary commitment decisions must be reviewed by independent decisionmaker to reduce error, since consequences of liberty deprivation are so severe).

With respect to the third *Mathews* factor, the INS asserts in vague and conclusory terms that it will be burdened by a mandate to provide prompt impartial review of its officers' findings of probable cause to arrest and detain children. The INS provides no specifics, however. Both the record and common sense, on the other hand, reveal that the requirement need not be unduly burdensome. A quasi-judicial scheme of administrative judges (immigration judges) already exists within the INS that could provide the necessary detached review. The institution of such a practice, moreover, will relieve INS law enforcement officers of the duty to review their fellow officers' arrests to determine whether a *prima facie* case for deportability exists.

Given the substantial liberty interest involved, the proven record and constant risk of error, and the failure of the INS to articulate anything more than vague and unsubstantiated objections to neutral review, I conclude that the due process clause requires the INS promptly to afford detained children an impartial and detached review of their detention. At such a hearing, the burden must be on the INS to demonstrate the propriety of detention. *Gallinot*, 657 F.2d at 1023 ("It is the state, after all, which must ultimately justify depriving a person of a protected liberty interest . . .").

C. Conditions on Release

Once the INS has demonstrated before a neutral and detached decisionmaker a *prima facie* case of deportability, the INS's legitimate interests in ensuring that child's return for future hearings and, to some extent, that child's safety entitle it to impose conditions on the child's release. Those conditions, however, may not restrict the child's liberty any more than is necessary to achieve the INS's stated goals of ensuring return and safety.

I wholeheartedly agree with the majority's holding that the regulation's prohibition on release to responsible third parties cannot survive scrutiny under the due process clause. Where, as here, the children detained have not individually been shown to be a flight risk, a threat to the community or to themselves, or guilty of any crime, governmental restrictions on liberty must be narrowly tailored to promote the government's articulated interests.

As the majority aptly demonstrates, the INS has not shown that precluding release to child welfare agencies, church groups, immigration rights' groups, and other responsible third parties increases the risks of flight or injury to the child. Unsubstantiated speculation that flies in the face of the historic record of successful releases to third parties cannot outweigh the children's compelling liberty interest. On the other hand, the tragic consequences of prolonged detention are readily discernible. Nor are the INS's liability concerns sufficient to justify confined detention. As the majority notes, the legal liability accompanying prolonged detention greatly exceeds the INS's unproven and overblown apprehensions about legal exposure after release to a responsible third party.

CONCLUSION

While the majority and I differ to some extent in our analyses of the constitutional issues presented, our points of agreement are much more numerous. I believe that the children's fundamental right to freedom from government detention has its roots, not only in the Constitution's guarantee of habeas corpus, but also in the fifth amendment's protection against deprivations of liberty without due process. I also agree with the majority's reasoning and conclusions concerning the conditions on release and procedural due process. I write separately on these issues only to emphasize that we are dealing with the constitutionality of two distinct deprivations of liberty—the initial decision to detain and secondly the conditions imposed upon release after detention. Only when the initial and most drastic deprivation of liberty has been accomplished in a manner that comports with the Constitution can we then address the legality of the INS's release conditions.

NORRIS, Circuit Judge, concurring:

I join Judge Schroeder's opinion for the *en banc* court, but write separately to say that the INS' policy of incarcerating children pending deportation hearings rather than releasing them to the temporary custody of responsible non-relative adults, not only violates due process, but does so flagrantly.

This case does not involve the fashioning of some "new" substantive due process right to "be released to unrelated adults," *see* dissenting op. at 10832 (Wallace, C.J.). It has nothing to do with the controversy over constitutional protection of privacy interests. The dissent's concern about limiting the reach of "substantive due process" and its reliance on such cases as *Bowers v. Hardwick*,

478 U.S. 186 (1986),¹ unnecessarily cloud the issue. If the word "liberty" as used in the Due Process Clause means anything, it means "liberty from bodily restraint . . . [which] is at the heart of the liberty protected by the Due Process Clause." *Board of Pardons v. Allen*, 482 U.S. 369, 373 n.3 (1987). The Supreme Court has repeatedly said that liberty includes freedom from bodily restraint as an absolute minimum. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1953) ("[L]iberty' . . . is not confined to mere freedom from bodily restraint."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922) ("[L]iberty . . . denotes not merely freedom from bodily restraint . . ."). Because the prehearing detention of children so clearly deprives them of their liberty, the Due Process Clause requires the INS to justify its policy by "sufficiently compelling governmental interests." *United States v. Salerno*, 481 U.S. 739, 748, 750 (1986).

The governmental interests asserted by the INS to justify its policy are trivial. The INS admits that its policy does not even serve the government's legitimate interest in assuring the children's appearance at deportation hearings. What the INS' justification for its policy boils down to is money. It claims that it does not have the "competence" or "resources" to "conduct meaningful screening . . . of the environment in which the children will live." *Appellants' Response to Order Dated August 20, 1990* at 6-7. It characterizes home studies as a "delicate undertaking" that is "ordinarily carried out by skilled social workers." *Id.* Translated, this means that our government chooses to hold children in detention facilities, despite the INS' lack of competence to care for them, rather than pay

¹ *Bowers* held that the Due Process Clause of the Fourteenth Amendment does not prohibit states from criminalizing homosexual sodomy.

for the services of qualified social workers to conduct home studies of the kind that county social service agencies perform routinely. The INS makes no effort to price such services, nor does it make any effort to show that the cost of such services would be greater than the cost of holding the children in the INS' own detention facilities. It merely throws up its bureaucratic hands and shrugs that it has no money to pay for home studies.

The INS' justification for its policy pales in comparison with the governmental interests that have been held to justify prehearing detention. These children are not dangerous, as in *Salerno*, 481 U.S. at 741 (approving detention of the head and "captain" of the Genovese crime family when "no release conditions 'will reasonably assure . . . the safety of any other person and the community.'") and *Schall v. Martin*, 467 U.S. 253, 264 (1986) (upholding detention of juvenile accused of hitting a youth over the head with a loaded gun under law "designed to protect the child and society from the potential consequences of his criminal acts"). Neither are they a menace to the public interest, as in *Carlson v. Landon*, 342 U.S. 524, 541 (1952) (upholding detention of alien Communist Party members to prevent "menace to public interest"), or a threat to the national security, as in *Ludecke v. Watkins*, 335 U.S. 160 (1948) (approving detention during World War II of enemy aliens found to be dangerous).

In an effort to salvage the INS policy, the dissent goes so far as to assert that the Due Process Clause provides less protection for the liberty of children than for the liberty of adults. Liberty interests are not "weighed differently for minors in comparison with adults." See dissenting op. (Wallace, C.J.) at 10833 (citing *Schall*). *Schall* stands for the quite different proposition that a juvenile's liberty interest can "in appropriate circumstances be subordinated to the State's *parens patriae* interest in preserving and pro-

moting the welfare of the child." *Schall*, 467 U.S. at 265 (emphasis supplied). Here the INS has no *parens patriae* interest to weigh against the juvenile's liberty interest. The dissent casts the INS as a parent, but I see only a jailer.

Finally, the mere incantation of Congress' plenary power over immigration policy should not be the siren song that leads us astray from applying settled due process principles to the facts of this case. Congress' broad power to fashion immigration policy no more authorizes the INS to hold people without due process than a state's sovereign power to pass criminal laws authorizes the imprisonment of people without due process. By invoking Congress' power to set standards of deportability as an excuse for the detention of children pending hearings on their deportability under those standards, the dissent blurs the distinction between the enactment of immigration laws and the enforcement of those laws. I know of no authority for the dissent's boundless description of the "judiciary's limited judicial role" in reviewing all "immigration decisions" or any action it can relegate to "the immigration context." See dissenting op. (Wallace, C.J.) at 10834-35. In applying due process principles, we balance "interests," not "contexts."

The very cases that the dissent cites for limiting judicial review of all "immigration decisions" recognize the crucial distinction that the dissent ignores. "In the enforcement of . . . [immigration policies], the Executive Branch of the Government must respect the procedural safeguards of due process [even if] the formulation of these policies is entrusted exclusively to Congress." *Fiallo v. Bell*, 430 U.S. 787, 792 n.4, at 793 (1977), quoting *Galvan v. Press*, 347 U.S. 522 (1954). Thus the cases cited by the dissent are inapposite in a case involving the detention of children during the process of enforcing the immigration laws. For example, *Adams v. Howerton*, 673 F.2d 1036

(9th Cir.), *cert. denied*, 458 U.S. 1111 (1982), involved judicial deference to a congressional decision to deny immigration preferences to partners in same sex relationships. *Galvan v. Press*, 347 U.S. 522, 531 (1954), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952), upheld statutes making Communist Party members deportable. Finally, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), upheld a statute denying immigration preferences to persons whose mothers are aliens, but whose fathers are citizens or lawful permanent residents. None of these cases involved the procedures followed by the INS in enforcing the immigration laws passed by Congress.

In sum, the deprivation of the children's liberty is so plain, and the government's interest in detaining them so trivial, that the due process violation could not be more clear-cut.

RYMER, Circuit Judge, concurring in the judgment in part and dissenting in part:

I agree with the majority that this case is particularly troubling. The thought of prolonged detention of children who have done nothing more than to be in this country illegally, and to be without a parent or relative willing to come to their rescue, touches a raw nerve in us all. Even so would we be sickened were one of these children to be precipitously released to abuse, neglect or worse.¹ A con-

¹ Obviously amici present no such risk. Neither the district court's order nor the majority's opinion, however, would limit release to organizations of their caliber. "Responsible adult party" is left undefined; a financially responsible adult may not be morally responsible, and vice versa. Nor does the order restrict release to a *legally* responsible adult, by contrast with 8 C.F.R. § 242.24(b)(4), which requires an unrelated adult to whom a juvenile may be released to execute an agreement to care for the juvenile's well-being. See also

stitutionally appropriate balance must therefore be struck between the alien minors' interest in freedom from institutional restraint and the government's responsibility for their safety.

I write separately even though I agree with much of the majority's bottom line, because I believe the case can be decided more narrowly and in a way that will safeguard valuable rights more effectively than the district court's order. I part company with both the district court and the majority to the extent they hold that the Constitution substantively requires release to any responsible adult who will promise to bring the minor to future hearings, and I disagree that a probable cause hearing is constitutionally required for juveniles held in deportation proceedings. Instead, I conclude that current INS procedures are constitutionally insufficient to afford an alien juvenile the process she is due when it has been determined that she may be released from INS custody, but that she has no parent, guardian, adult relative, or person designated by a parent or guardian to assume custody. Without assurance of an early determination by a neutral hearing officer of whether to release the juvenile under these circumstances, and absent an outside limit on the length of time the juvenile may continue to be held even though it has been determined that she is eligible for release, the risk that the child will be unduly detained outweighs the government's remaining interests in maintaining custody and assuring well-being.

§ 242.24(b)(3) (imposing a similar requirement on a person designated by the parent or legal guardian to take custody of a detained juvenile in their absence). So the district court's order also leaves open the possibility of release to an adult who appears to be morally and financially responsible, but whose legal responsibility for care and presence lacks teeth and is unenforceable.

The Due Process Clause of the Fifth Amendment assures that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The Supreme Court has held that

the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v. California*, 342 US 165, 172, 96 L Ed 183, 72 S Ct 205, 25 ALR 1396 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v Connecticut*, 302 US 319, 325-326, 82 L Ed 288, 58 S Ct 149 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v Eldridge*, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976). This requirement has traditionally been referred to as 'procedural' due process.

United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

The district court's judgment does not indicate which component was violated. To the extent its order requires a substantive change in the regulation — directing release to a "custodian, conservator, or other responsible adult party" who promises to bring the minor to future hearings, I infer that the court believed § 242.24(b)(4) runs afoul of due process on substantive grounds; I assume it also found the regulation wanting on procedural due process grounds since it ordered an administrative hearing to determine probable cause for the minor's arrest and need for restrictions on her release.

While Flores does contend that the minors' interest in personal liberty is a fundamental constitutional right that

substantively overrides the INS restriction on release of children, in her brief to this court and at oral argument she concedes that the district court's order may be seen as wholly procedural and could be affirmed on procedural grounds. Because I agree that the INS's regulation falters for lack of minimum procedures comporting with due process, I see no need to reach more broadly at this time.²

The fifth amendment protects physical freedom by requiring that the government satisfy rigorous procedural safeguards before taking it away. Procedural fairness has traditionally been tested under *Mathews v. Eldridge*, 424

² Section 242.24(b)(4) appears to assume that the INS has made no determination that detention is required to ensure timely appearance or safety. While release to an unrelated adult is not mandatory, as it is to a parent, guardian or adult relative under § 242.24(b)(1), the regulation itself creates a liberty interest in freedom from continued restraint. The dispositive question for us, therefore, is whether the procedures by which the INS decides if it should release a juvenile to the custody of an unrelated adult survive facial challenge.

Assuming that alien juveniles have a protected liberty interest in freedom from institutional restraint such that their failure to be released to a "responsible adult" who promises future appearances triggers substantive due process scrutiny, see *Salerno*, 481 U.S. at 750, their interest "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody," *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984). Thus, their real interest is not in freedom from restraint (detention), but in freedom from a particular kind of limitation on the conditions under which release will be permitted. Because the children are minors, the government's *parens patriae* responsibilities are implicated and the juveniles' interest in freedom from restraint is therefore less substantial than an adult's and their interest in being released to any "responsible adult" is less substantial than their interest in being released to a parent, guardian or family member with whom they enjoy a natural or legal bond. By the same token, the government's interests in exercising its nearly plenary power over immigration, and discharging its obligation to protect and promote the welfare of juveniles within its custody, are substantial.

U.S. 319, 334-335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The Court restated the framework for analysis in *Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982), an immigration case, as follows:

The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances. In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

Id. at 34 (citations omitted).

The alien juveniles' interest has considerable weight: they stand to continue losing freedom from INS restraint even though the INS will not have determined that they need to be detained for reasons of flight or safety.³ On the other hand, the government's interests in the well-being of minors in its custody and in assuring that these children not be entrusted to the care of an unqualified person are likewise strong. In addition,

[t]he Government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the

³ Flores also complains of the Catch-22 the regulation creates on account of the fact that parents or adult relatives of alien juveniles may be deterred from coming forward to the INS because they, too, may be here illegally. While there is nothing much for it, the conundrum does to some extent affect the juveniles' opportunity to rejoin their family. See *Landon*, 459 U.S. at 34 (right to rejoin immediate family ranks high among the interests of the individual).

executive and the legislature. The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.

Id. at 34-35 (citations omitted).

Flores challenges the regulation on four scores: (1) lack of a probable cause hearing on deportability; (2) lack of a prompt custody hearing; (3) failure to impose a burden of proof on the government; and (4) absence of independent review. She urges that the district court's order imposing limited procedural safeguards, be affirmed. While the INS agrees that the record permits Flores's procedural due process claim to be resolved by this court without remand for further proceedings, it argues that the claim lacks merit because there is minimal risk of erroneous deprivation of the minors' interest. It relies on 8 U.S.C. § 1357(a)(2), which provides that an alien must be taken for examination before an officer other than the one who arrested her "without unnecessary delay," and on a regulation that requires the examining officer to be satisfied that there is prima facie evidence to believe the alien is deportable. 8 C.F.R. § 287.3 (1990). It therefore argues that even if *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), applies in a civil proceeding, the district court erred in mandating a probable cause hearing because the INS's standard is higher and is subject to review by an examining officer as well as the arresting officer. For these reasons it contends that requisite standards of fairness are met.

Turning first to whether a probable cause hearing is required, I agree with the INS that importing *Gerstein* to a civil immigration proceeding is problematic, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479, 82 L.

Ed. 2d 778 (1984) (consistent with civil nature of deportation proceeding, protections such as exclusionary rule that apply in context of criminal trial are not applicable). No authority suggests that a probable cause hearing before a neutral magistrate, as distinguished from a prima facie evidence hearing before an examining officer, is constitutionally mandated in deportation proceedings. Our cases suggest the contrary, see, e.g., *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975) (declining to require Miranda warnings in deportation proceeding); *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969) (sixth amendment safeguards not applicable in deportation proceeding), *cert. denied*, 400 U.S. 854, 91 S. Ct. 72, 27 L. Ed. 2d 92 (1970), and there is no call to hold otherwise.

The INS's argument, however, fails to come to grips with the absence of other, well-recognized ingredients of procedural fairness. Unlike the statutes at issue in *Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984), and *Salerno*, which survived due process challenges,⁴ the INS regulations provide no opportunity

⁴ In *Salerno*, 481 U.S. at 751-52, the extensive safeguards under Bail Reform Act included: judicial evaluation of likelihood of dangerousness; detainees had right to counsel and could testify and present information; the judicial officer's discretion was statutorily guided; the government has the burden of proof by clear and convincing evidence; and the judicial officer had to make findings of fact and give reasons for a decision to detain, which was immediately reviewable on appeal. In *Schall*, 467 U.S. at 257 n.3, 270, preventive detention of juveniles suspected of a criminal offense promoted legitimate interests of society and the juvenile and did not amount to punishment such that it offended substantive due process when: the detention was limited in time; a neutral magistrate determined that detention was necessary; the time limits seemed suited to the limited purpose of providing the young person with a controlled environment and separating the juvenile from improper influences pending a speedy disposition of the case; and the conditions of confinement reflected regulatory purposes that were not inconsistent with *parens patriae* objectives.

for the reasoned consideration of an alien juvenile's release to the custody of a non-relative by a neutral hearing officer.⁵ Nor is there any provision for a prompt hearing on a § 242.24(b)(4) release. No findings or reasons are required. Nothing in the regulations provides the unaccompanied detainee any help, whether from counsel, a parent or guardian, or anyone else. Similarly, the regulation makes no provision for appointing a guardian if no family member or legal guardian comes forward. There is no analogue to a pretrial services report, however cursory. While the INS argues that it lacks resources to conduct home studies, there is no substantial indication that some investigation or opportunity for independent, albeit informal consideration of the juvenile's circumstances in relation to the adult's agreement to care for her is impractical or financially or administratively infeasible. Although not entirely clear where the burden of proof resides, it has not clearly been imposed on the government. And there is no limit on when the deportation hearing must be held, or put another way, how long the minor may be detained. In short, there is no ordered structure for resolving custodial status when no relative steps up to the plate but an unrelated adult is able and willing to do so.

Current procedures tend to deprive the minors of their interest in release in at least two major respects. First, there is no process there. While procedures provided by the executive in immigration matters are rarely held inadequate, *Landon*, 459 U.S. at 33, some process is due. See *Carlson v. Butterfield*, 342 U.S. 524, 538, 72 S. Ct. 525, 96

⁵ Subsection 242.24(b)(4) provides for a decision on release to an adult other than a parent, guardian or relative to be made by the district director or chief patrol agent. The INS suggests no reason why this determination could not be made in conjunction with the prima facie evidence hearing.

L. Ed. 2d 547 (1952). Nothing in this regulation triggers any determination at any particular time of whether an alien juvenile who is presumptively eligible, for release, but has no family, may be released to the custody of an unrelated adult who will agree to her care and appearance. Nor is there is any light at the end of the tunnel; there is no time limit on continued detention, despite the child's eligibility for release. For all that appears from the regulations, the juvenile without parent, guardian or relative is left in procedural limbo. Second, there is no provision for reasoned consideration by a neutral hearing officer. Time limits and impartiality are not uncommon procedures; both are basic safeguards against arbitrary action. See, e.g., *Salerno*, 481 U.S. at 751-52; *Schall*, 467 U.S. 257 n.3, 270.⁶ To omit both increases the risk that the juvenile for whom detention is not needed and for whom there is a prospective adult willing to assume care and assure appearance will not be released because of inattention, inadvertence or intransigence.

With these protections in place, I see no problem with the regulation's failure to put the burden of proof on the government. I do not construe § 242.24(b)(4)'s mention of "unusual and compelling circumstances" as requiring the child to show anything unusual about herself or about the adult ready to care for her. I interpret the phrase to be simply a shorthand reference to the admittedly unusual and compelling circumstances of a juvenile who has no parent, guardian, or adult relative to take custody upon release, as contrasted with juveniles who have such parties to be released to under subsection (b)(1). The INS itself characterizes mandatory release under (b)(1) as "routine."⁷ By contrast, release to an unrelated adult

⁶ See *supra* note 4.

⁷ Supplemental Brief at 1 n.2.

under subsection (b)(4) is neither mandatory nor routine, but rather it is an "unusual and compelling" circumstance in which discretion must be exercised so as to assure the child's well-being as well as appearance. So construed, the "unusual and compelling" language does not infringe due process because it imposes no impediment to release that is unrelated to the juvenile's status and the government's interest.

Because immigration is involved, the government has a greater interest in using the procedures now in place than it might have in other civil matters, such as commitment proceedings, or in criminal cases. There is little question that the INS is not in the business of social work,⁸ and its disinclination to play probation officer as well as prosecutor is quite understandable. Yet the obvious value that the Court has seen in the array of safeguards built into the Bail Reform Act, and the New York Family Court Act authorizing pretrial detention of accused juvenile delinquents, which it considered in *Salerno* and *Schall*, must have great weight against the modest imposition that a reasonable time limit, hearing before a neutral officer and a level playing field would entail. An examining officer who is obliged to be impartial is obviously available because conduct of the prima facie evidence hearing is entrusted to such a person.

Moreover, apart from inconvenience and perhaps some expense, there is no readily apparent reason why the INS cannot discharge its parens patriae obligations by seeking appointment of a guardian ad litem for minors in its custody. See, e.g., *Juvenile Justice and Delinquency*

⁸ Cf., e.g., *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (courts defer to decisions of qualified professionals, meaning a person competent to make particular decision at issue).

Prevention Act, § 504, codified at 18 U.S.C. § 5034 (providing that magistrate may appoint guardian ad litem if parent or guardian of juvenile is not present, will not cooperate, or has adverse interests to the juvenile); *Schall*, 467 U.S. at 276 n.25 (noting that under § 320.3 of the New York Family Court Act, if juvenile's parent or guardian fails to appear after reasonable and substantial efforts have been made to notify such person, court must appoint a law guardian for the child). The probable value of such a procedure would be appreciable, in that the otherwise unassisted juvenile would have some legally responsible adult to assist in making placement decisions—and the INS would correspondingly be relieved of the task of individualized decisionmaking that it does not want in any event. While it would be inappropriate for a court to impose such a procedure on the INS just because it makes sense to a judge, it is appropriate to consider the availability and practicality of different procedures in determining whether current procedures comport with minimum requirements of due process. See *Landon*, 459 U.S. at 35.

Considering current procedures and alternatives in light of the juveniles' interest in freedom from continued restraint and the government's in their well-being and appearance leads me to conclude that the balance tips against constitutional sufficiency of the process used by the INS in determining whether to release a child under § 242.24(b)(4). At a minimum, the juvenile who is presumptively eligible for release but has no parent or relative should be afforded an early hearing before a neutral officer. Unlike the majority or the district court, I would not remove the hearing officer's discretion, but that discretion should be informed by the government's interests in appearance and well-being and the juvenile's in release to a fully responsible adult.

Accordingly, I would affirm the district court's grant of summary judgment for Flores because the INS regulations fail to meet minimum requirements of procedural due process. I would strike those parts of the district court's judgment that rewrite § 242.24(b)(4) to require release to a "responsible adult party" who promises to bring the minor to future hearings and that mandate a probable cause hearing in place of the prima facie evidence hearing. I believe subsection (b)(4) as written affords greater flexibility and protection to minors in this respect than the order, because it permits release to any adult so long as that adult agrees to care for the child's well-being and to assure her presence. I would also strike the requirement of an administrative hearing to determine need for detention, and I would modify the order to require a prompt hearing before a neutral hearing officer to determine whether the minor should be released under § 242.24(b)(4) construed consistently with the constraints of due process.

WALLACE, Chief Judge, with whom Circuit Judges WIGGINS, BRUNETTI, and LEAVY join, dissenting:

The facts were adequately summarized in the majority panel opinion. *See Flores v. Meese*, No. 88-6249, slip op. 10747, 10761-68 (9th Cir. Sept. 7, 1990) (*Flores*). I have no quarrel with the majority's assertion that alien children allegedly in this country illegally are impacted by the regulation at issue and have a right to challenge their detention. *See* Maj. op. at 10790-93. But I find much of the majority's discussion, such as that regarding habeas corpus review, irrelevant to the crucial issues in this case, and other portions of the opinion lacking in support. I believe that the majority errs in implicitly defining the right at issue here as a blanket denial of liberty, thereby

granting it a fundamental character, and in ignoring the deference that courts have traditionally paid to immigration laws and regulations. Primarily for these reasons, I respectfully dissent.

I

My first disagreement with the majority is over the liberty right at issue. At oral argument, the alien children argued that the regulation impinged on their right to be free from physical restraint—a right to liberty which they allege is fundamental. The Immigration and Naturalization Service (INS), on the other hand, contended that the right at issue is a nonfundamental right to be released to unrelated adults. Without discussion, the majority adopts the former characterization, a characterization with which I disagree.

Perhaps the insistence on viewing the right at issue as a general "right to liberty" comes from the majority's mistaken characterization of the regulation as a "blanket detention policy." Maj. op. at 10781. As the facts demonstrate, however, the regulation results in no such blanket denial. The regulation does not bar the release of all alien juveniles, but merely those who do not have an identifiable parent, legal guardian or adult relative who can accept custody or designate an appropriate custodian. *See* 8 C.F.R. § 242.24 (1991). Even children whose release is not mandated under the regulation can, in the discretion of the INS, be released to other responsible adults. *See id.* § 242.24(b)(4). Thus, alien children awaiting deportation proceedings are eligible for release to a number of caregivers; the only liberty right denied them is the right to be released to unrelated adults without INS approval.

Given the limited scope of the regulation, I believe the majority errs by concluding that this case involves a

"fundamental right to be free from government detention." Maj. op. at 10794. This broad characterization of the right involved conflicts with the Supreme Court's warning that rights and interests should be defined narrowly for the purposes of substantive due process balancing. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (*Bowers*) (defining the right at issue as the right to engage in homosexual sodomy, rather than as the more general "right to be let alone"); *Michael H. v. Gerald D.*, 491 U.S. 110, 121-27 & n.6 (1989) (plurality opinion). The majority fails to heed this warning in holding, without persuasive analysis, that the right implicated by the regulation is a general right to liberty.

The need to define the right narrowly is further supported by policy and precedent. No case has been cited to us (and I have found none) in which a court has ever recognized a fundamental *substantive* due process right to physical liberty. Instead, *procedural* due process analysis has traditionally provided adequate protection against any unwarranted deprivations of physical liberty. As Justice Scalia recently stated, "[t]he text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty 'without due process of law.'" *Cruzan v. Director, Missouri Department of Health*, 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring). To hold otherwise, would subject all physical detentions—in both the immigration context and criminal context—to judicial review under strict scrutiny to insure that their fundamental substantive due process "right to liberty" was not being infringed. Such cannot be the law.

None of the cases cited by the majority support its novel holding that this case involves a "fundamental right to be free from government detention." Maj. op. at 10794. For example, the majority cites a number of habeas corpus

cases to establish the unremarkable proposition that aliens may challenge a detention through a habeas corpus proceedings. See, e.g., *Wing Wong v. United States*, 163 U.S. 228, 233-38 (1896) (sentence of one year of hard labor for all deportable aliens may be challenged through habeas corpus petition). However, the existence of a forum is quite separate from the definition or analysis of the right at issue, and these cases provide no support for the majority's application of heightened scrutiny to invalidate the INS regulation. Compare *id.* at 235 ("[w]e think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid").

The majority also relies heavily on *Carlson v. Landon*, 342 U.S. 524 (1952) (*Carlson*), and *United States v. Salerno*, 481 U.S. 739 (1987) (*Salerno*), for the proposition that this case implicates the "fundamental right" to be free from detention. However, in both of the cited cases, the Supreme Court upheld, rather than struck down, a challenged detention. In addition, neither support the conclusion that the limited detention policy at issue here need satisfy any form of heightened scrutiny.

In *Carlson*, the Supreme Court held that INS detention based on Communist party membership did not violate due process. To reach this conclusion, the Court first held that Congress had authorized the Attorney General to make discretionary decisions concerning detention pending deportation. 342 U.S. at 540. Relying on the legislative history of the statute, the Court stated that "Congress [intended] to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse." *Id.* Applying this test, the Court concluded that the discretion was "certainly broad enough" to justify the challenged detention. *Id.* at 541.

The majority argues that *Carlson* holds that “the INS cannot detain individuals without a particularized exercise of discretion through which it determines that detention of an individual would prevent harm to the community or further some other important governmental interest.” Maj. op. at 10794. But such an inference is unsupported by either the reasoning, or the result in the case. As stated earlier, *Carlson* did not strike down the regulation, it found it well within the INS’s discretion. In discussing the factors that supported the INS’s exercise of discretion, the Court explicitly stated that such discretion “[could] only be overridden where it is clearly shown that it ‘was without a reasonable foundation.’” *Carlson*, 342 U.S. at 541; see also *id.* (detention need not be justified by “specific acts” performed by detained individual). Thus, *Carlson* actually undermines, rather than supports, the majority’s broad characterization of the right at issue in this case and consequent application of heightened scrutiny to invalidate the INS regulation.

The majority also cites *Salerno* in support of its holding that the INS must come forward with “significant” reasons to justify its limited detention policy. But *Salerno*, which upheld pretrial detention under the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, is not on point. First, *Salerno* involved a *blanket detention* of certain dangerous felons—the regulation at issue in this case is much narrower as it only prohibits release of alien minors to unrelated adults without INS approval. Compare 18 U.S.C. § 3142 with 8 C.F.R. § 242.24 (1991). Second, the Court’s due process analysis in *Salerno* was geared primarily toward the rights of adult citizens facing detention in the criminal context. See *Salerno*, 481 U.S. at 747-52. The situation before us in this case involves the rights of juvenile aliens facing detention in the civil context, whose rights are not necessarily coextensive with those of adults.

See *infra*, sec. II. In addition, *Salerno* did not squarely hold that freedom from pretrial detention was a fundamental right. Instead, the Court stated that “we cannot categorically state that pretrial detention offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” 481 U.S. at 751 (quotations and citations omitted). Thus, *Salerno* also does not support the majority’s assumption that the detention policy implicates a “fundamental right” to liberty.¹

¹ The additional cases cited by the two separate concurrences also do not support the majority’s application of heightened scrutiny to invalidate the INS regulation. For example, *DeShaney v. Winnebago City Social Services Department*, 489 U.S. 189 (1989), only makes passing reference to “restraint[s] of physical liberty,” when discussing situations where the state’s affirmative exercise of power gives rise to a duty to protect. *Id.* at 199-200, citing *Youngberg v. Romero*, 457 U.S. 307 (1982) (state has duty to provide safe conditions to involuntarily committed mental patients). *DeShaney* cannot be read as establishing any general right to liberty; indeed, its holding only addresses the issue of whether the government’s failure to confer aid violates due process. *Id.* at 202. *Board of Pardons v. Allen*, 482 U.S. 369 (1987), is also not on point, because it deals with *procedural due process* issues that arise after a statute has created a liberty interest. *Id.* at 372-73. *Allen* does not address any constitutionally-based substantive due process challenge. Other cases cited by the concurrences are similarly inapplicable here. See *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (rejecting children’s *procedural due process* challenge to state’s procedures for involuntary commitment); *Greenholtz v. Inmates, Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979) (rejecting *procedural due process* challenge to parole release hearings).

One case cited by the concurrences does address an issue similar to the one before this court. In *Youngberg*, the Court articulated a standard for evaluating deprivations of liberty that occur during the course of an involuntary commitment. After holding that the liberty interest asserted by the inmate was protected by the due process clause, the Court stated that the challenged physical restraints would be upheld as long as the actions of the mental health therapists were reasonable.

The majority finally justifies its rejection of the INS's characterization of the right at issue by arguing that "the right to be released to unrelated adults" is merely the *remedy* the district court imposed in striking down the regulation. Maj. op. at 10796-97. But the majority misses the point of its remedy analysis. The district court imposed the remedy of release to unrelated adults only because it concluded that a right was being denied, the right to be released to such adults. I believe it makes more sense to view the right and consequent remedy as coexistent; if the right at issue was broader, the remedy imposed by the district court to correct for its denial would necessarily have been broader.

In light of these considerations, I analyze the regulation as resulting in a denial of the nonfundamental right to be released to unrelated adults unless the INS grants permission. See *Bowers*, 478 U.S. at 194-95 (warning against the expansion of the list of fundamental rights). Because no fundamental right is involved, we must apply minimal scrutiny to the regulation, and consider whether it is rationally related to any legitimate end of government. *Christy v. Hodel*, 857 F.2d 1324, 1329 (9th Cir. 1988), cert. denied, 490 U.S. 1114 (1989). Both the INS's desire to protect the safety of the detained children, as well as its concern for potential liability for harm that could befall a released child, are legitimate ends to which the regulation is rationally related. See *Flores*, slip op. at 10793-95; see also *infra*, sec. II. I therefore disagree with the majority's

457 U.S. at 316, 322. The Court stated: "the Constitution only requires that the courts make certain that professional judgment in fact was exercised . . . this standard is lower than the 'compelling' or 'substantial' necessity tests the Court of Appeals would require." *Id.* at 321-22 (quotations omitted). Thus, *Youngberg* actually undermines the position of the concurrences by demonstrating that deprivations of liberty need not be evaluated using heightened scrutiny.

conclusion that the INS regulation violates substantive due process.

II

Aside from its characterization of the right at issue as the fundamental right to liberty, I am further troubled by the majority's failure to recognize the special circumstances of this case. Two factors should influence our analysis of the constitutionality of the challenged regulation. First, the court's analysis should focus on the immigration context of this case, where judicial review is extremely limited. Second, the court must deal with the accepted principle that liberty interest is weighed differently for minors in comparison with adults.

A.

Flores's constitutional claims arise in the unique context of our immigration laws. The power over immigration is political in nature and therefore vested in the political branches. *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) (*Diaz*); *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984) (en banc) (*Jean*), *aff'd on other grounds* 472 U.S. 846 (1985). Although the executive and legislative branches in theory possess concurrent authority over immigration, "[i]n practice . . . the comprehensive character of the INA vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress." *Jean*, 727 F.2d at 965; see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

The Supreme Court has long recognized Congress's paramount power to control matters of immigration. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*Fiallo*); *Galvan v.*

Press, 347 U.S. 522, 531 (1954); *Carlson*, 342 U.S. at 534; *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952). Congressional power in this area is plenary; the Court has repeatedly stressed that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 792, quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). In exercising its broad power over immigration and naturalization, " 'Congress regularly makes rules that would be unacceptable if applied to citizens.' " *Id.*, quoting *Diaz*, 426 U.S. at 80. Because Congress's power over immigration is plenary and political in nature, the exercise of that power is subject " 'only to narrow judicial review.' " *Id.*, quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (*Hampton*); *Diaz*, 426 U.S. at 81-82.

The plenary power of Congress and the narrowness of judicial review in the immigration context is reflected in the Supreme Court's teaching that any substantive due process rights aliens might have are extremely limited. For example, in *Harisiades*, the Court upheld the deportation, under the Alien Registration Act of 1940, of legally resident aliens who had been members of the Communist Party before passage of the Act. While acknowledging that the Act "stands out as an extreme application of the expulsion power," the Court rejected the aliens' argument that the Congress's power to deport was "so unreasonably and harshly exercised" that the Act violated the due process clause. 342 U.S. at 588. Similarly, in *Galvan*, the Court upheld a statute that authorized deportation of legally resident aliens on the grounds that they had once been members of the Communist party, stating that "[w]e cannot say that this classification by Congress is so baseless as to be violative of due process." 347 U.S. at 529. In subsequent cases dealing with both equal protection and sub-

stantive due process challenges under the fifth amendment, the Supreme Court reaffirmed the limited judicial role in reviewing immigration decisions. *Fiallo*, 430 U.S. at 792-93 & n.4; *Hampton*, 426 U.S. 99-103.

As a result of the judiciary's limited role in the immigration context, we have held that even if the right at issue is fundamental in character, the court should not apply strict scrutiny review to an immigration regulation. In *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982), we considered the argument that substantive due process required the application of strict scrutiny to an immigration statute dealing with spouses. The homosexual plaintiffs argued that, as interpreted to apply only to heterosexual marriages, the statute violated their right to same-sex marriage, a right they contended was fundamental. We stated that "[w]e need not . . . reach the question of the nature of the claimed right or whether such a right is implicated in this case. *Even if it were*, we would not apply a strict scrutiny standard of review to the statute. [In the immigration area] the decisions of Congress are subject only to limited judicial review." *Id.* at 1041 (emphasis added and footnote omitted). Therefore, following *Adams*, and the extensive Supreme Court precedent in this area, even if I were to agree with the majority that this case involves a fundamental right, I would still apply rational review to the evaluate the regulation.

The majority's failure to defer to the INS is also demonstrated by its ready conclusion that neither of the INS's articulated reasons are "significant" enough to support the regulation. The majority first rejects the INS's belief that the regulation serves to protect the safety of the detained children. It assumes that release of the children to unrelated adults will be far preferable to detainment by the INS. Maj. op. at 10798-99. But the majority fails to cite

any evidence in the record to support its factual assumption. Indeed, there is none. More important, the INS thinks otherwise, and in keeping with prior precedent I would defer to its estimation of the risks involved. No one on this court can be sure there is no evil awaiting an unsuspecting alien minor in the custody of an unrelated adult. A concern about that possibility is not unreasonable. Simply put, the majority contends that it owes no deference to the INS's views on child safety because "[c]hild welfare is not an area of INS expertise." Maj. op. at 10798. This is a far too limited view of the deference owed to the INS, one that conflicts with the Supreme Court's statement that "[a]ny policy toward aliens is vitally and intricately interwoven" with matters that have "been committed to the political branches of the Federal Government." *Diaz*, 426 U.S. at 81 & n.17; see also *Carlson*, 342 U.S. at 538 (pointing out that "[d]etention is necessarily a part of [the] deportation procedure").

The majority ignores the fact that any judicial branch intrusion, even if explained by a belief that the INS has no special expertise, severely undermines congressional power over immigration. The majority's citation to *Hampton*, fails to support this intrusion, because that case dealt with the federal Civil Service Commission, not the INS. See 426 U.S. at 101 (recognizing political character of power over immigration, but rejecting argument that deference extends to "any agency of the National government"). I therefore disagree with the majority's casual conclusion that the INS must put forth affirmative evidence to demonstrate "that detention serves the best interests of members of the plaintiff class." Maj. op. at 10799. I would not strike down so easily the INS's efforts to protect the detained children, and would consider those efforts significant enough to support the regulation.

The majority also casually dismisses the INS's claim that releasing children to unrelated adults could result in tort liability. While acknowledging that the minors would have a cause of action against the INS for a violation of their rights, the majority finds the chance of tort liability "remote at best." Maj. op. at 10801, quoting *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1208 (1991). The sole support for this assertion is *DeShaney v. Winnebago City Social Services Department*, 489 U.S. 189 (1989) (*DeShaney*), where the Supreme Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

A careful reading of *DeShaney* reveals that the case has no bearing on the possibility that the INS will be held liable for releasing alien minors to unrelated adults. In holding that *DeShaney* had could not recover against the state welfare agency for its failure to remove him from an abusive home environment, the Court repeatedly emphasized that "the State played no part in creating [the danger]" and was not liable merely for its failure to confer aid. *Id.* at 196-97, 201. However, the Court was careful to distinguish *DeShaney*'s case from one where the dangerous situation was created by the State action. In the latter situation, the Court was unwilling to foreclose liability, and instead stated that "[h]ad the State by the affirmative exercise of its power removed Joshua [DeShaney] from free society and placed him in a foster home operated by its agents, we might have a situation [that would] give rise to an affirmative duty to protect." *Id.* at 201 n.9. Thus, *DeShaney* clearly does not foreclose the possibility of INS liability for injury to a released child, when the harm occurred after the INS placed him or her in the care of an unrelated adult. See *id.*

The majority's assertion that the INS is unlikely to suffer any liability also seems odd in light of its holding that the INS must release minors to unrelated adults only after "mak[ing] the necessary determination of whether a party who is willing to assume custody is fit to do so." Maj. op. at 10800-01. In light of the majority's apparent acceptance of the INS's claim that it lacks the resources or expertise to conduct these studies, maj. op. at 10799, its imposition of a duty to do so seems likely to result in liability. At any rate, given our deferential review, I would defer to the INS's rationale for the policy rather than seeking out reasons to discredit it.

B.

In addition to failing to give required deference to the INS regulation, the majority accords no significance to the fact that this case involves detention of children, rather than adults. Because the INS's reasons for the policy relate directly to their responsibility to protect minors, I believe that the Supreme Court's teachings regarding the constitutional rights of minors are relevant to our analysis.

As the majority correctly points out, there is no doubt that children are " 'persons' under our Constitution" who possess "fundamental rights which the State must respect." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969); *In re Gault*, 387 U.S. 1, 13 (1967) ("whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). However, the majority fails to include in its analysis the Supreme Court's often stated teaching that constitutional rights of children are not coextensive with those of adults. See, e.g., *Schall v. Martin*, 467 U.S. 253, 263-66 (1984) (*Schall*); *Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979) (plurality opinion) (*Bellotti*); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1978).

The Court has specifically recognized the narrower scope of juveniles' liberty interest. In *Schall*, the Court held that the state may restrict a child's liberty interest in order to secure that child's welfare. In upholding the constitutionality of a New York statute authorizing the pre-trial detention of certain juveniles, the Court stated:

The juvenile's . . . interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial. . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

467 U.S. at 265 (citations omitted), quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); see also *Bellotti*, 443 U.S. at 634 (stating three reasons why "the constitutional rights of children cannot be equated with those of adults," including "the peculiar vulnerability of children").

In my view, the teachings of *Schall* and *Bellotti* are particularly relevant to the facts of this case. The INS's regulation governing the detention of minors is based at least in part upon a concern for the "peculiar vulnerability" of alien minors. See *Bellotti*, 443 U.S. at 635 ("the State is entitled to adjust its legal system to account for children's vulnerability . . ."). Thus, the INS's regulation is an exercise of governmental power which takes into account the need to provide for children "[when] parental control falters." *Schall*, 467 U.S. at 265.

The majority ignores these cases, and instead relies on *In re Gault*, for the proposition that “children should be treated in a manner least restrictive of liberty.” Maj. op. at 10798. *In re Gault* dealt with a procedural, rather than substantive, due process challenge, and I am at a loss to find any categorical statement concerning the liberty rights of children in the text of the opinion. Compare *In re Gault*, 387 U.S. at 13 (stating that bill of rights does not apply in same manner to children as adults). Moreover, since *In re Gault* was decided, the Supreme Court has made it clear that childrens’ liberty interests are not identical to those of adults. *Schall*, 467 U.S. at 265.

The majority also relies heavily on federal and state policies which, it claims, “favor[] avoidance of institutionalization of juveniles.” Maj. op. at 10796. However, even assuming the existence of such policies, they are irrelevant to our analysis. The question presented here is what the Constitution requires, not what federal and state governments favor. See *DeShaney*, 489 U.S. at 202-03 (drawing distinction between duties imposed by state legislature and duties embodied in the Constitution). I therefore fail to see how legislative policy “compels the conclusion that” the plaintiffs’ status as minors is irrelevant to our assessment of their constitutional rights. Maj. op. at 10796.

Thus, I believe that the Supreme Court’s rulings regarding the diminished liberty interests of minors should be factored into our constitutional analysis. The majority therefore errs in asserting that there is “no legal basis” for the INS’s professed concern for the best interests of alien minors. Maj. op. at 10797. Because the INS’s statement of reasons for the limited detention policy are concerns that the Supreme Court has already found legitimate, this is additional evidence that the challenged regulation is reasonable.

III

In the final section of the opinion, the majority upholds the district judge’s ruling that a minor taken into custody must be given “an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release.” Although the district judge’s ruling apparently rested on the procedural due process test embodied in *Gerstein v. Pugh*, 420 U.S. 103 (1975), see *Flores*, slip op. at 10798, the majority sees no need to determine whether *Gerstein* applies in this case. Instead, the majority concludes that the new procedural requirements are logically connected to its holding that the INS may not detain minors solely on the ground that there is no adult or legal guardian to care for the child. Maj. op. at 10801-02.

The majority states that requiring detention hearings does not materially alter existing INS regulations. Maj. op. at 10802. In reaching this conclusion, the majority holds that the district judge’s order only imposes two additional requirements on the INS. First, the order makes detention hearings mandatory, when the hearings were previously only available at the request of the minor. *Id.*; see 8 C.F.R. § 242.2(c) & (d) (1991). Second, the order requires that the hearing include an inquiry into whether a nonrelative may be appropriate to take custody of the child. Maj. op. at 10802.

As stated earlier, I do not agree that the INS regulation at issue here violates substantive due process. I therefore cannot join in the majority’s imposition of these new procedural requirements. However, the majority’s analysis is problematic for a second reason – it fails to acknowledge, much less analyze, the possible broader implications of the judge’s order. This issue needs to be clarified.

The district judge held that "[a]ny minor taken into custody" shall be given "an administrative hearing to determine probable cause for his arrest." Under current INS procedures, minors arrested without a warrant are entitled to have probable cause reviewed by an immigration official "without unnecessary delay." See 8 U.S.C. §1357(a)(2). Because this procedure existed prior to the *Flores* litigation, the panel speculated that the district judge intended to impose an additional requirement that the probable cause hearing take place before an immigration judge. Otherwise, the majority pointed out that "the injunction [would be] deprive[d] of much practical effect." *Flores*, slip op. at 10798.

By holding that the judge's order will not materially affect INS procedures, the majority implicitly rejects the panel's original assumption and holds instead that the current arrest and probable cause requirements satisfy the judge's order. Any other interpretation of the order is inconsistent with the majority's refusal to engage in any due process analysis. Therefore, despite the broad language of the judge's order, the majority's affirmance of that order should not be read to require any change in these procedures.

I also do not read the majority's opinion as imposing any additional requirements on the INS in terms of timing and execution of the detention hearings. The majority references the current hearing procedures as adequate to safeguard the interests of the minors. See maj. op. at 10802. Therefore, with the exception of the new requirement that such hearings be held automatically, the majority opinion does not entail any alteration in current INS procedure.

The procedural component of the district judge's order is potentially quite sweeping. For this reason, I adhere to

my original position, as stated in the panel majority opinion, that we should remand the case for a determination of what procedures are constitutionally required under *Mathews v. Eldridge*, 424 U.S. 319 (1976). See *Flores*, slip op. at 10797-802 (discussing appropriate test for procedural due process analysis).

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 88-6249

JENNY LISETTE FLORES, A MINOR, BY NEXT FRIEND MARIO
HUGH GALVEZ-MALDONADO; DOMINGA HERNANDEZ-
HERNANDEZ, A MINOR, BY NEXT FRIEND JOSE SAUL MIRA;
ALMA YANIRA CRUZ-ALDAMA, A MINOR, BY NEXT FRIEND
HERMAN PERILLO TANCHEZ, PLAINTIFFS-APPELLEES

v.

EDWIN MEESE, III; IMMIGRATION & NATURALIZATION
SERVICE; HAROLD EZELL, DEFENDANTS-APPELLANTS

Argued and Submitted April 5, 1989

Decided June 20, 1990

As Amended Sept. 7, 1990

Class of alien minors brought suit challenging Immigration and Naturalization Service (INS) regulation governing release of detained alien minors. The United States District Court for the Central District of California, Robert J. Kelleher, J., granted summary judgment to aliens, holding that regulation violated substantive due process, and ordered modifications to the regulation. Attorney General and INS appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) INS did not exceed its authority in issuing regulation; (2) regulation did not

violate substantive due process; and (3) Supreme Court's *Gerstein* decision holding that Fourth Amendment required review, by neutral and detached magistrate, of probable cause for arrest prior to any extended restraint of liberty following arrest did not apply.

Reversed and remanded.

Fletcher, Circuit Judge, filed dissenting opinion.

See also 681 F.Supp. 665.

Opinion, 913 F.2d 1315, superseded.

Ian Fan, Asst. U.S. Atty., Los Angeles, Cal., for defendants-appellants.

Carlos Holguin, Nat. Center for Immigrants' Rights, Inc., Los Angeles, Cal., for plaintiffs-appellees.

Appeal from the United States District Court for the Central District of California.

Before WALLACE and FLETCHER, Circuit Judges, and LLOYD D. GEORGE,* District Judge.

WALLACE, Circuit Judge:

The Attorney General and Immigration and Naturalization Service (INS) appeal the district court's summary judgment to a plaintiff class of alien minors whose named representative is Jenny Flores (Flores). The district court held that an INS regulation governing the release of detained alien minors violates substantive due process, and ordered modifications to the regulation. The district court also held that INS procedures fell short of the requirements of procedural due process, and therefore ordered the INS "forthwith" to provide to any minor in custody an "administrative hearing to determine probable cause for

* Honorable Lloyd D. George, United States District Judge, District of Nevada, sitting by designation.

his arrest and the need for any restrictions placed upon his release." On appeal, the INS challenges both of the district court's holdings. The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We reverse and remand.

I

The case arises out of the INS's efforts to deal with the growing number of alien children entering the United States by themselves or without their parents (unaccompanied alien minors). Pursuant to 8 U.S.C. §§ 1357(a)(2) and 1252(a)(1), INS agents may arrest and detain aliens, including alien minors, whom they suspect may be deportable. Section 1252(a)(1) provides that

any such alien taken into custody may, in the discretion of the Attorney General and pending . . . final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

8 U.S.C. § 1252(a)(1) (emphasis added). Section 1252(a)(1) also authorizes the Attorney General, "in his discretion" and "at any time," to revoke an alien's bond or parole. Plaintiffs are a class of alien minors who are being detained without bail by the INS pending deportation proceedings. The conditions of the plaintiffs' confinement are not at issue in this case. The issue is whether, and in what manner, the plaintiffs may be detained.

Section 1252 applies to *deportable* aliens only. Under our immigration laws, there is a fundamental distinction between "excludable" and "deportable" aliens and a

corresponding distinction between exclusion and deportation proceedings. See 1 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 1.03[7] (rev. ed. 1989). Compare 8 U.S.C. §§ 1221-1230 (provisions relating to entry and exclusion) with *id.* §§ 1251-54 (provisions relating to deportation). Excludable aliens are those who have not "entered" the United States as that term is used in the immigration laws. See *Leng May Ma v. Barber*, 357 U.S. 185, 187-90, 78 S.Ct. 1072, 1073-75, 2 L.Ed.2d 1246 (1958); 8 U.S.C. § 1101(a)(13). By contrast, deportable aliens are those who have entered the United States but whose presence violates the immigration laws. At issue in this case are the statutory provisions governing, and the rights of, deportable aliens only.

Under the statutory framework governing detention of deportable aliens, an alien detained pending deportation proceedings may obtain judicial review of a detention or bond release decision "upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." 8 U.S.C. § 1252(a)(1). Because this provision "deals only with complaints about delays in determining deportability in individual cases," it does not foreclose a challenge to an INS regulation brought under 28 U.S.C. § 1331 rather than in habeas corpus proceedings. *National Center for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir.1984). After an order of deportation against an alien has been made final, the Attorney General is authorized to detain that alien for up to six months. 8 U.S.C. § 1252(c). After the six months has elapsed, the Attorney General must release the deportable alien but may thereafter supervise him. 8 U.S.C. § 1252(d).

The Attorney General is authorized by Congress to establish regulations which are necessary to carry out his authority under the immigration laws. 8 U.S.C. § 1103(a). The Attorney General may delegate his responsibilities to other executive officers and indeed has delegated much of his authority over immigration to the Commissioner of the INS, who in turn has authorized the Deputy Commissioner to exercise the same degree of power, 8 U.S.C. § 1103(a); 8 C.F.R. § 100.2(1988); *see also Patel v. INS*, 638 F.2d 1199, 1201 & n. 1 (9th Cir.1980).

Under 8 U.S.C. § 1252(a)(1), the Attorney General may continue a deportable alien in custody and prescribe bond release conditions. Prior to 1984, no national policy existed regarding when an alien minor in deportation proceedings could be released on bail. By contrast, regulations did exist governing the release of alien minors who were in exclusion proceedings. *See* 8 C.F.R. § 212.5(a)(2)(ii) (1987).

In 1984, the INS's Western Region adopted a policy governing release of detained alien minors in deportation proceedings. The policy provided that

[n]o minor shall be released except to a parent or lawful guardian. This is necessary to assure that the minor's welfare and safety is [sic] maintained and that the agency is protected against possible legal liability.

District Directors and Chief Patrol Agents are authorized, in unusual and extraordinary cases, to release a minor to a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child. Release shall not be permitted if any doubt exists that the child will be properly protected.

Four plaintiffs, including named plaintiff Flores, filed this class action on July 11, 1985. The district court subse-

quently certified a class of alien minors comprising

[a]ll persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the [INS] within the INS' Western Region and who have been, are, or will be denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them.

Flores's complaint contained seven claims, only the first two of which are relevant to this appeal. The first claim alleged that the Western Region's bond release condition violated the Immigration & Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. § 552 *et seq.*, the fifth amendment's due process clause and equal protection guarantee, and international law. Flores's second claim challenged the INS's failure to provide (1) "prompt written notice" to the detainee that the bond release condition had been imposed, and (2) "prompt, mandatory, neutral and detached" review following arrest of (a) whether probable cause to arrest existed, (b) whether imposition of the bond condition was necessary to ensure future appearance, and (c) whether any available adult was suitable to ensure the detained juvenile's well-being and appearance at future proceedings. The second claim alleged that these failures violated due process and international law. Plaintiffs' last five claims, which challenged various conditions of the minors' confinement, including the INS's provision for education, recreation, and visitation, were resolved by settlement or motion and are not issues in this appeal.

The INS moved for partial summary judgment, and the district court held that the bond release condition did not violate the INA, APA, or international law, but deferred decision on the due process and equal protection claims until further discovery had been conducted.

Flores subsequently moved for summary judgment on various grounds, and the district court ruled that the bond release condition embodied in the Western Region's policy violated equal protection since no rational reason existed for treating alien minors in exclusion proceedings differently from alien minors in deportation proceedings. Under 8 C.F.R. § 212.5(a)(2)(ii) (1987), alien minors in exclusion proceedings could be paroled to persons other than parents or legal guardians, including relatives such as sisters or brothers as well as non-relatives. Pointing to the fact that the INS had no uniform policy governing the release of alien minors, the district court ordered the INS to treat minors in deportation under the exclusion standards.

Thereafter, on October 15, 1987, the INS published in the *Federal Register* a proposed rule "to codify Service policy regarding detention and release of juvenile aliens and to provide a single policy for juveniles in both deportation and exclusion proceedings." 52 Fed.Reg. 38,245 (proposed Oct. 15, 1987). Comments upon the proposed regulation were requested. *Id.*

Flores moved for summary judgment on the due process issues, which the INS opposed and cross-filed for summary judgment. At the hearing on the motions, the district court was advised that the INS was in the process of publishing the final version of the alien minor detention regulation, and the district court ordered that a copy of the new regulation be filed. The final regulation was published in the *Federal Register* on May 17, 1988, and a copy of it was filed with the district court on the same date. Detention and Release of Juveniles, 53 Fed.Reg. 17,449 (1988). The regulation is now codified at 8 C.F.R. § 242.24 (1989).

The final regulation,¹ which differs only slightly from the proposed regulations, governs release of alien "juve-

¹ The final regulation provides in part:

§ 242.24 Detention and release of juveniles.

(a) *Juveniles.* A juvenile is defined as an alien under the age of eighteen (18) years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others. In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile had identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

8 C.F.R. § 242.24 (1989).

niles," defined as aliens under the age of 18. 8 C.F.R. § 242.24 (1988). It provides that an alien minor "for whom bond has been posted . . . or who ha[s] been ordered released on recognizance" would be released, in order of preference, to a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, grandparent), provided such person is not in INS detention. *Id.* However, even if such a person is available to accept custody, release will not take place if "a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others." *Id.* The INS retains discretion in "unusual and compelling circumstances" to release a juvenile to an adult who is not a parent, legal guardian or adult relative, so long as the adult "executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge." *Id.*

The supplementary information section of the final regulation explained that "the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings." 53 Fed.Reg. 17,449. It cautioned, however, that

with respect to juveniles a determination must also be made as to whose custody the juvenile should be released. On the one hand, the concern for the welfare of the juvenile will not permit release to just any adult. On the other hand, the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released. This rule strikes a balance by providing a list of appropriate custodians while maintaining the discretion of the District Director or the Chief Patrol Agent to release a juvenile to an adult other than those

listed individuals in unusual and compelling circumstances.

Id. The supplementary information section also summarized various comments on the regulation which had been accepted or rejected. It stated that the INS had rejected the suggestion of several commentators that the list of custodians be expanded to include "any responsible adult." *Id.* It explained that the INS "has attempted to provide for release to those individuals considered responsible for the juvenile's welfare. Release to others . . . on a routine basis, would require the performance of home studies for which the Service is neither adequately funded nor qualified." *Id.*

The parties filed supplemental briefs on the effect of the new regulation, and the district court, in a brief, one and one-half page order, granted summary judgment to Flores on her first and second claims "on due process grounds."

We review the entry of summary judgment de novo. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir.1989) (en banc). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Id.* Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We must view the evidence in the light most favorable to the nonmoving party. *Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.*, 856 F.2d 78, 80 (9th Cir.1988).

II

Flores first urges us to affirm the district court's modification of section 242.24 on nonconstitutional grounds. In *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), the Supreme Court cautioned that "[p]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Id.* at 854, 105 S.Ct. at 2997, quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193, 2199, 68 L.Ed.2d 693 (1981). The Court characterized this as a "'fundamental rule of judicial restraint.'" *Id.*, quoting *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984). The INS concedes that we may consider the nonconstitutional argument in this appeal.

Arguing that the INS lacks statutory authority to issue the minor detention regulation, Flores seeks to invoke our prior decision in *National Center for Immigrants' Rights v. INS*, 791 F.2d 1351 (9th Cir. 1986) (*National Center*), cert. granted and vacated, 481 U.S. 1009, 1009-10, 107 S.Ct. 1881, 1882, 95 L.Ed.2d 489 (vacating and remanding for reconsideration in light of Immigration Reform and Control Act of 1986), on remand, 818 F.2d 869 (9th Cir. 1987) (remanding to district court). In *National Center*, we held that the INS exceeded its statutory authority in promulgating a blanket "no-work" bond condition for aliens in deportation proceedings. Despite broad authorization in the statute, we relied on legislative history in holding that the Attorney General's authority "is limited to the imposition of bond conditions which tend to insure the alien's appearance at future deportation proceedings." 791 F.2d at 1356. Flores argues that because the INS regulation at issue in this case does not insure the alien's appearance at deportation proceedings, the INS exceeded its authority in issuing this regulation.

Because the Supreme Court vacated our decision in *National Center*, that decision no longer has any legal effect. "The effect of vacating the judgment below is to take away from it any precedential effect." *Troy State University v. Dickey*, 402 F.2d 515, 516 (5th Cir.1968); see also *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41, 71 S.Ct. 104, 107, 95 L.Ed. 36 (1950) (stating that motion to vacate judgment "is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences") (emphasis added). Thus, we may not rely on *National Center*'s precedential value as a basis for affirming the district court.

Congress has delegated exceptionally broad rulemaking and enforcement powers to the Attorney General under the immigration laws. See *Bilbao-Bastida v. INS*, 409 F.2d 820, 822 (9th Cir.), cert. dismissed, 396 U.S. 802, 90 S.Ct. 21, 24 L.Ed.2d 59 (1969); *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1500 (D.C.Cir.1988) (en banc); *Amanullah v. Nelson*, 811 F.2d 1, 4-5 (1st Cir.1987). Under section 1103(a), the Attorney General is authorized to "establish such regulations . . . as he deems necessary for carrying out his authority" under chapter 12 of title 8 of the United States Code, 8 U.S.C. §§ 1101-1503. See also H.R.Rep. No. 1365, 82d Cong., 2d Sess., reprinted in 1952 U.S.Code Cong. & Admin.News 1653, 1687.

In *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973), the Supreme Court set forth the standard for evaluating the validity of an agency regulation "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act.'" *Id.* at 369, 93 S.Ct. at 1660. The Court concluded that "the validity of a regulation promulgated thereunder will be sustained so

long as it is 'reasonably related to the purposes of the enabling legislation.' " *Id.* (footnote omitted), quoting *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 280-81, 89 S.Ct. 518, 526; 21 L.Ed.2d 474 (1969); see also *Holy Cross Hospital-Mission Hills v. Heckler*, 749 F.2d 1340, 1344 (9th Cir. 1984). In *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir.1972) (*Sam Andrews' Sons*), we articulated a similar standard of review for regulations promulgated in the area of immigration—an area where the Executive Branch possesses residual constitutional authority because of its foreign affairs powers. See *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir.1984) (en banc) (*Jean*), *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). In *Sam Andrews' Sons*, we stated that the Attorney General's regulations promulgated under the INA "must be upheld if they are founded 'on considerations rationally related to the statute he is administering.'" 457 F.2d at 748, quoting *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (*Fook Hong Mak*); see also *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C.Cir. 1979) (*Narenji*) (same), *cert. denied*, 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980). Thus, we need only inquire as to whether the considerations underlying the INS's regulation are rationally related to the statute.

In arguing that section 242.24 does not exceed his rulemaking authority, the Attorney General does not rely upon the general rulemaking authority granted by section 1103(a) alone. Instead, he argues that the detention regulation is one "he deems necessary for carrying out his authority" specifically granted by 8 U.S.C. § 1252(a)(1), which empowers him "in his discretion" to "continue[] in custody" an alien arrested under warrant, or to release such alien "under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may pre-

scribe." 8 U.S.C. § 1252(a)(1). Flores counters by arguing that section 1252(a)(1) authorizes only those bond release conditions which serve the sole purpose of ensuring the alien's future appearance at deportation proceedings.

While both parties characterize the INS regulation as imposing a "bond release condition" on alien juveniles, we conclude that the INS regulation actually is closer to a *condition of bail or a condition for release*, at least as applied to the plaintiff class. That is, the regulation does not impose a condition upon plaintiffs which restricts their activities *after* release; instead, it *bars* such release in the first place. See *Matter of Toscano-Rivas*, 14 I & N Dec. 523, 527 (B.I.A.1972), *on reconsideration*, 14 I & N Dec. 538, 539-41 (B.I.A. 1973), *aff'd on other grounds*, 14 I & N Dec. 550, 555 (A.G.1974) (*Toscano-Rivas*) (distinguishing between detention and bond release conditions). Thus, in contrast to the regulation analyzed in *National Center*, the regulation at issue in this case derives primarily from the Attorney General's detention power rather than from his power to prescribe bond conditions. However, since the Attorney General's detention and bond release condition powers are interrelated, and their statutory evolution intertwined, we will examine them together.

Our review of both the language and legislative history of section 1252(a)(1) discloses no intent to limit the Attorney General's power to detain arrested aliens pending deportation proceedings to those situations where detention is necessary to ensure the alien's future appearance. We begin with the language of section 1252(a)(1). The language is extremely broad in authorizing the detention and release on bond of aliens pending deportation proceedings. It provides that "*any . . . alien taken into custody may, in the discretion of the Attorney General and pending . . . final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than \$500 with security approved*

by the Attorney General, *containing such conditions as the Attorney General may prescribe.*" 8 U.S.C. § 1252(a)(1) (emphasis added). This language discloses no limitation on the Attorney General's detention powers before an order of deportation is made final, except perhaps that implied by the word "discretion." See *Carlson v. Landon*, 342 U.S. 524, 540-41, 72 S.Ct. 525, 534, 96 L.Ed. 547 (1952) (*Carlson*) (Attorney General's exercise of discretion "can only be overridden where it is clearly shown that it 'was without a reasonable foundation.'"); *Rubinstein v. Brownell*, 206 F.2d 449, 455 (D.C.Cir.1953), *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954). Section 1252(a)(1)'s language certainly does not explicitly or implicitly limit the Attorney General's power to detain to situations where it is necessary to ensure the alien's future appearance.

While section 1252(a)(1) specifically authorizes the Attorney General to prescribe bond release conditions, it does not authorize him to prescribe conditions for release. Instead, the Attorney General is simply authorized, in his discretion, to continue aliens in custody, that is, to deny release pending deportation proceedings. We do not view this as an obstacle to the regulation's validity, however. As mentioned above, section 1103(a) generally authorizes the Attorney General to make regulations which "he deems necessary" to carry out his authority under the immigration laws. 8 U.S.C. § 1103(a). In light of the broad mandate of section 1103(a), "[t]he statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him." *Narenji*, 617 F.2d at 747.

Nor does the rather complicated legislative history disclose such a limited congressional purpose behind section 1252(a)(1). Section 1252(a)(1) in its present form derives principally from section 242(a) of the INA. Con-

gress's purpose in passing the INA was "to enact a comprehensive, revised immigration, naturalization, and nationality code." H.R.Rep. No. 1365, *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1653. The particular purpose behind section 242 of the INA was to enact "detailed and comprehensive provisions relating to the apprehension and deportation of aliens who are within the deportable classes." *Id.* at 1711.

Section 242(a) of the INA had a rather complex genealogy. Its origins can be traced to section 20 of the Immigration Act of 1917. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917). Section 20 authorized the Department of Labor, then the administering agency, to release an individual on bond pending deportation proceedings. *Id.* The 1917 Act provided that the alien "may be released under a bond in the penalty of not less than \$500 with security approved by the Secretary of Labor, *conditioned that such alien shall be produced* when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States." *Id.* at 891 (emphasis added). The 1917 Act did not explicitly authorize detention; it did so only by implication, by specifying that release on bond was permissible. The Act required as a bond release condition that the alien agree to appear at subsequent proceedings but was silent in regard to the power to impose other conditions.

In 1950, Congress amended section 20 of the 1917 Act through passage of the Subversive Activities Control Act (SACA), enacted as Title I of the Internal Security Act of 1950. Internal Security Act of 1950, Pub.L. 81-831, § 23, ch. 1024, 64 Stat. 987, 1010-12 (1950), *reprinted in* 1950 U.S. Code Cong. & Admin. Serv. 984, 1005-07. The Internal Security Act's purpose was to "deport all alien Communists as a menace to the security of the United States

... " *Carlson*, 342 U.S. at 541, 72 S.Ct. at 534. Of particular importance to our inquiry is section 23 of SACA, since section 242(a) of the INA was patterned after it. As the House Report stated, "[section 242], in general, follows the procedure established by section 23 of [SACA]". See H.R.Rep. No. 1365, *reprinted in* 1952 U.S.Code Cong. & Admin.News at 1711.

Section 23 of SACA amended section 20 of the 1917 Act to read in part:

Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than \$500, with security approved by the Attorney General. . . . It shall be among the conditions of any such bond . . . that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody . . . and for deportation if an order for his deportation has been made.

SACA § 23, *reprinted in* 1950 U.S.Code Cong. & Admin.News 984, 1006. Section 23 expanded the Attorney General's powers in several important ways. First, it expressly authorized detention of aliens pending a final determination of deportability. Second, it clarified that a mandatory condition of every release on bond was that the alien agree to appear at future deportation proceedings, and it implied that other bond conditions could be prescribed. Third, by adding various references to the Attorney General's "discretion," section 23 clarified that decisions regarding detention and release on bond were matters committed to the discretion of the Attorney Gen-

eral. The added reference to the Attorney General's "discretion" was also meant to resolve a split in the circuits by overruling a Sixth Circuit case which had held that the absence of such language in section 20 of the 1917 Act indicated a congressional intent to grant aliens a right to bail pending deportation proceedings. *Carlson*, 342 U.S. at 539, 72 S.Ct. at 533-34.

The legislative history on section 23 of SACA is sparse. The conference report contains little more than a terse statement of Congress's purpose in expanding the Attorney General's powers under section 23: "to provide more effective control over, and to facilitate the deportation of, deportable aliens." H.R.Conf.Rep. No. 3112, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong.Serv. 3886, 3899, 3911. In *Carlson*, the Supreme Court traced the language of section 23 of SACA back to virtually identical language in the Hobbs Bill, H.R. 10, 81st Cong., 1st Sess., a precursor to SACA which was introduced by Representative Hobbs on January 3, 1949, but never enacted. *Carlson*, 342 U.S. at 538-39, 72 S.Ct. at 533-34. In *Carlson*, the Court looked to the legislative reports on the Hobbs Bill in interpreting the Attorney General's bail power under SACA. *Id.* at 538-39 & n.32, *quoting* H.R.Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S.Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950). Thus, although the Hobbs Bill was never enacted, its legislative history is "wholly relevant" to an understanding of SACA, a subsequent statute, since the operative language in both was substantially the same. See *United States v. Enmons*, 410 U.S. 396, 404 n. 14, 93 S.Ct. 1007, 1012 n. 14, 35 L.Ed.2d 379 (1973); *Toscano-Rivas*, 14 I & N Dec. at 554 n. 13 ("[T]he reports on H.R. 10 can appropriately be regarded as part of the legislative history of [SACA]"). This is especially true in this case, since the relevant language of

section 23 of SACA governing release was taken verbatim from the Hobbs Bill. *Compare* SACA § 23, *reprinted in* 1950 U.S.Code Cong.Serv. 984, 1005, *with* H.R.Rep. No. 1192, 81st Cong., 1st Sess. 2 (1949).

An examination of the House and Senate Reports on the Hobbs Bill reveals that Congress intended the Attorney General's power to detain and formulate bond conditions to be exceptionally broad. *See* H.R.Rep. No. 1192, 81st Cong., 1st Sess. (1949); S.Rep. No. 2239, 81st Cong., 2d Sess. (1950). Both reports contained the same explanation of how the bill would alter the 1917 Act:

Existing law merely states generally that pending the final disposal of the case of any alien so taken into custody, he may be released under a bond of not less than \$500, with security approved by the Attorney General, and conditioned that he shall be produced when required for a hearing on the charges against him and for deportation if found unlawfully in this country.

. . . Th[is] bill will *expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody, or to release them under bond . . . , pending final determination of their deportability and for a 6-month period after an order of deportation is issued* The bill further provides that *among* the conditions of any bond exacted . . . there shall be a condition that the alien shall be produced when required for defense against the charges upon which he appears to be deportable and for deportation if he is found subject to that action. . . . These provisions, of course, enumerate *only one* of the conditions which is mandatory in the bond or as a parole condition. The bill intends that the Attorney General shall

have *full discretion* in imposing *any other conditions or terms* in the bond or parole agreement *which he may see fit to include*. Thus, a man released on bond might have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information. Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in greater or less amount or other conditions shall be furnished. The bill intends that the Attorney General shall have *untrammelled authority* to impose *such conditions or terms as he sees fit* in releasing an alien under bond . . . pending final determination of the deportability of the alien and for six months after an order of deportation has been issued against him.

S.Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added); *see also* H.R.Rep. No. 1192, 81st Cong., 1st Sess. 5-6 (1949).

To summarize, the Hobbs Bill, upon which section 23 of SACA was patterned, was meant to confer broad power upon the Attorney General to detain aliens prior to a final determination of deportability. Section 242(a) of the 1952 INA carried forward the provisions of section 23 of SACA. In its final form, section 242(a) did, however, include additional language which made explicit what had been only implicit in its predecessor provisions: that the Attorney General was authorized to prescribe bond conditions beyond merely ensuring appearance. *See* INA § 242(a), *reprinted in* 1952 U.S.Code Cong. & Admin.News 166, 208-09 (authorizing "release[] under bond in the amount of not less than \$500 with security

approved by the Attorney General, *containing such conditions as the Attorney General may prescribe*") (emphasis added).

In *Carlson*, the Supreme Court, after reviewing the legislative history of section 23 of SACA, concluded that "the language of the reports is emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse." 342 U.S. at 540, 72 S.Ct. at 534. "Courts that have reviewed decisions denying aliens bail since the 1952 Act have, apparently unanimously, transferred the presumption [of correctness] to cases under that Act." *United States ex rel. Barbour v. District Director of the INS*, 491 F.2d 573, 577-78 (5th Cir.), *cert. denied*, 419 U.S. 873, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974).

Despite the broad authorization to detain and set conditions of bond reflected by the statutory language and legislative history, *see also id.* at 577, the Attorney General's detention power is not limitless. *See Carlson*, 342 U.S. at 544, 72 S.Ct. at 536 (in upholding Congress's delegation of power to Attorney General under Subversive Activities Control Act to hold subversive resident aliens without bail, observing that "[t]he authority to detain without bail is to be exercised within the framework of the . . . Act to guard against Communist activities pending deportation hearings."). Thus, while the Attorney General may not act in a manner "totally unrelated to the various purposes of the immigration laws," *Toscano-Rivas*, 14 I & N Dec. at 554, he does have broad discretion in acting to fulfill the purposes of those laws.

In light of the foregoing, we reject Flores's argument that any regulation structuring the Attorney General's discretion to detain arrested aliens pending deportation proceedings exceeds his statutory authority unless it serves the *sole* purpose of ensuring the alien's future appearance

at deportation proceedings. There is no question that one, and perhaps the primary, purpose of detention under section 1252(a)(1) is to ensure the future appearance at deportation proceedings. *See id.* 342 U.S. at 542, 72 S.Ct. at 535. In *Carlson*, however, the Supreme Court endorsed a broader concept of the Attorney General's discretion to refuse release than that advanced by Flores. The Court there explained that "the discretion reposed in the Attorney General [to deny release under SACA] is at least as great as that found by the Second Circuit in the *Potash* case, *supra*, to be in him under the former bail provision [section 20 of the Immigration Act of 1917]." 342 U.S. at 540, 72 S.Ct. at 534. On the opinion's preceding page, the Court had quoted a passage from *United States ex rel. Potash v. District Director of INS*, 169 F.2d 747 (2d Cir.1948) (*Potash*), which read:

The discretion of the Attorney General . . . is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail.

Carlson, 342 U.S. at 539-40 n. 33, 72 S.Ct. at 534 n. 33, *quoting Potash*, 169 F.2d at 751. Since these factors go beyond merely ensuring the appearance at future proceedings, Flores's argument fails.

We next consider whether the INS's regulation is "founded 'on considerations rationally related to the statute [it] is administering.'" *Sam Andrews' Sons*, 457 F.2d at 748, *quoting Fook Hong Mak*, 435 F.2d at 730. We conclude that it is. The regulation is rationally related to the purpose of ensuring the detained minor's appear-

ance at future proceedings. The supplementary information section of the final regulation clearly explains that "the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings." 53 Fed.Reg. at 17,449. Although under section 242.24(b)(1), a juvenile may be released to a parent, legal guardian or adult relative not in INS detention, the INS may refuse to release the alien minor if it determines "that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court." In addition, release either to a person designated by the parent or guardian under section 242.24(b)(3), or to an adult other than a parent, legal guardian or adult relative under section 242.24(4), is contingent upon the receiving person's execution of an agreement "to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge." 8 C.F.R. § 242.24(b)(3) (1989). These features establish a rational relationship to the goal of ensuring future appearance.

The regulation serves other purposes as well, in particular the goal of ensuring the alien minor's well-being by favoring release to certain relatives or legally responsible parties, and the related goal of limiting the INS's legal liability by not releasing alien juveniles to someone other than an enumerated party. We view these other purposes as rationally related to effecting the purposes of the statute. In the supplementary information section of the final regulation, the INS explained that:

On the one hand, the concern for the welfare of the juvenile will not permit release to just any adult. On the other hand, the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released. This rule strikes a balance by providing a list of appropriate

custodians while maintaining the discretion of the District Director or the Chief Patrol Agent to release a juvenile to any adult other than those listed individuals in unusual or compelling circumstances.

53 Fed.Reg. 17,449. This explanation of the regulation offers a legitimate and reasoned justification for its provisions. The presence of these other purposes does not render the regulation beyond the Attorney General's rulemaking authority.²

² The dissent accuses the majority of "go[ing] to great lengths to deny liberty to children whose only possible offense is their alienage," *infra* at 1014, and later implies that the majority is "so unfeeling as to be unconcerned with the tragic effects on children." *Infra* at 1025. With all due respect to the dissenter, we cannot agree that the court's decision whether to require the release of children illegally in the country to unrelated adults is one that should be resolved by attempted characterizing or mischaracterizing the judges' personal feelings. We suggest that an objective analysis of the INS's rule demonstrates it to be a reasonable compromise reached by an agency with limited resources. The dissent assumes, without record support, that release of the children to *unrelated* adults would be far preferable to detainment by the INS. However, the INS thinks otherwise and, unlike the three members of this panel, it had the benefit of notice and comment rulemaking.

As the INS has made clear, it does not possess the resources to undertake a home study of unrelated adults who seek custody of the children. *See supra* at 1002. Thus, if we were to adopt the dissent's approach and order the INS to release the children to unrelated adults, there would be no way to ensure that the children would not be released to child abusers, sexual deviants, or adults that would subject the children to severe neglect. Consequently, the dissent is incorrect in assuming that release of the children to unrelated adults would necessarily benefit the children more than continued detention. Indeed, the risks involved in releasing the children to unknown adults may be far greater than the risks of continued detention. In any event, even if the INS's policy may not be the best possible policy, we are bound to uphold it if it has a rational basis. All we conclude is that it has.

III

Having concluded that the INS did not exceed its statutory authority in promulgating the detention regulation, we turn now to Flores's constitutional challenges, which consist of a substantive and a procedural due process claim.

A.

We first consider Flores's substantive due process claim. The INS argues that the district court erred in holding that the INS's regulation violates substantive due process.

The due process clause of the fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." The fifth amendment's due process clause applies to aliens within the jurisdiction of the United States, even if their "presence in this country is unlawful." *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1975) (*Diaz*); see also *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896). Thus, the fifth amendment generally applies to the plaintiff class.

Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v. California*, 342 U.S. 165, 172 [72 S.Ct. 205, 209, 96 L.Ed. 183] (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325-26 [58 S.Ct. 149, 152, 82 L.Ed. 288] (1937)." *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). Our analysis begins with determining whether the protection of the due process clause's substantive component, as distinguished from its procedural component, extends to deportable aliens.

Flores's constitutional claims arise in the unique context of our immigration laws. The power over immigration is

political in nature and therefore vested in the political branches. *Diaz*, 426 U.S. at 81-82, 96 S.Ct. at 1891-92; *Fong Yue Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 1022, 37 L.Ed. 905 (1893) (*Fong Yue Ting*); *Jean*, 727 F.2d at 964-65. The Constitution specifically authorizes Congress to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. But the statutory and regulatory mandates involved in this case did not emanate from this constitutional grant of authority. As the Eleventh Circuit in *Jean* aptly observed, "[i]t is worth emphasizing that while the Court could have implied the power to regulate immigration from constitutional grants of legislative powers such as the right to declare war, to approve treaties, to regulate foreign commerce, to establish a uniform rule of naturalization, and to enact all necessary and proper laws, the Court instead declared that 'the control of immigration [is] an implied power arising out of national sovereignty and existing without regard to any constitutional grant.'" *Jean*, 727 F.2d at 964; quoting 1 C. Gordon & H. Rosenfield, *Immigration Law & Procedure* § 2.2a (rev. 1982); see also *Chae Chan Ping v. United States [The Chinese Exclusion Case]*, 130 U.S. 581, 603-06, 9 S.Ct. 623, 629-30, 32 L.Ed. 1068 (1889); *Fong Yue Ting*, 149 U.S. at 711, 13 S.Ct. at 1021 (characterizing the "right to exclude or to expel all aliens" as "an inherent and inalienable right of every sovereign and independent nation"); *Augustin v. Sava*, 735 F.2d 32, 36 (2d Cir.1984).

Although the executive and legislative branches in theory possess concurrent authority over immigration, "[i]n practice . . . the comprehensive character of the INA vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress." *Jean*, 727 F.2d at 965;

see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S.Ct. 309, 313, 94 L.Ed. 317 (1950); *Fong Yue Ting*, 149 U.S. at 713, 13 S.Ct. at 1022. The Supreme Court has long recognized Congress's paramount power to control matters of immigration. *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (*Fiallo*); *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (*Galvan*); *Carlson*, 342 U.S. at 534, 72 S.Ct. at 531; *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952); *Fong Yue Ting*, 149 U.S. at 713, 13 S.Ct. at 1022; *The Chinese Exclusion Case*, 130 U.S. at 609, 9 S.Ct. at 631. Congressional power in this area is plenary; the Court has repeatedly stressed that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 792, 97 S.Ct. at 1478, quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909). In exercising its broad power over immigration and naturalization, " 'Congress regularly makes rules that would be unacceptable if applied to citizens.' " *Id.*, 430 U.S. at 792, 97 S.Ct. at 1478, quoting *Diaz*, 426 U.S. at 80, 96 S.Ct. at 1891. Because Congress's power over immigration is plenary and political in nature, the exercise of that power is subject " 'only to narrow judicial review.' " *Id.*, quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21, 96 S.Ct. 1895, 1904-05 n.21, 48 L.Ed.2d 495 (1976) (*Hampton*); *Diaz*, 426 U.S. at 81-82, 96 S.Ct. at 1892; *Kleindienst v. Mandel*, 408 U.S. 753, 765-67, 92 S.Ct. 2576, 2582-84, 33 L.Ed.2d 683 (1972) (*Mandel*); *Galvan*, 347 U.S. at 530-32, 74 S.Ct. at 742-43.

The plenary power of Congress and the narrowness of judicial review in the immigration context is reflected in the Supreme Court's teaching that any substantive due process rights aliens might have are extremely limited.

Indeed, the Court's first two important cases in this area suggested that deportable aliens had *no* substantive due process rights. In *Harisiades*, the Court upheld the deportation, under the Alien Registration Act of 1940, of legally resident aliens who had been members of the Communist Party before the 1940 Act's enactment. The Court rejected the aliens' argument that Congress's power to deport "is so unreasonably and harshly exercised by this enactment that it should be held unconstitutional [under the Due Process Clause]." 342 U.S. at 588, 72 S.Ct. at 516. Though acknowledging that the Act under review "stands out as an extreme application of the expulsion power," *id.*, the Court concluded that "in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to *deny or qualify* the Government's power of deportation." *Id.* at 591, 72 S.Ct. at 520 (emphasis added). Earlier in its discussion of the substantive due process claim, however, the Court observed that "[i]t is not necessary and probably not possible to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution." *Id.* at 590, 72 S.Ct. at 519; see also *id.* at 588-89, 72 S.Ct. at 518-19 ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be *largely* immune from judicial inquiry or interference.") (footnote omitted) (emphasis added). Justice Frankfurter's separate concurrence was free of such ambiguity regarding the constitutional limits of Congress's power: "the underlying policies of what classes of aliens shall be allowed to enter and what classes shall be allowed to stay, are for Congress exclusively to determine even though such determination

may be deemed to offend American traditions. . . ." *Id.* at 597, 72 S.Ct. at 523 (Frankfurter, J., concurring).

Two years later the Court decided *Galvan*, which rejected a similar challenge to the Internal Security Act of 1950. Like the 1940 Act, the Internal Security Act authorized the deportation of legally resident aliens on the grounds that they had once been members of the Communist Party. *Galvan* argued that the 1950 Act violated substantive due process because it allowed the government to deport him without proving that (1) while a member of the Communist Party, he knew that it advocated violence, or (2) that the Communist Party did in fact advocate violence while he was a member. Viewing *Harisiades* as controlling, the Court, this time with Justice Frankfurter writing for the majority, rejected both arguments. As for Congress's decision to dispense with the requirement of proving, in individual cases, that the Communist Party did advocate violent overthrow of the government, the Court stated that it "cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress." *Id.* at 529, 72 S.Ct. at 528. This statement implies that some statute might fail to pass muster under the due process clause. The Court went on, however, to address *Galvan's* argument that the statute was unconstitutional because it did not require individualized proof that, while a member, he was aware of the Communist Party's advocacy of violence:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause *qualifies* the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the *enforcement* of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.*

347 U.S. at 530-31, 74 S.Ct. at 743 (citations omitted). The quoted passage suggest that the due process clause places no substantive limitation on congressional power in this area, in spite of some language in *Galvan* and *Harisiades* which could be interpreted to mean that the substantive component of the due process clause might pose some undefined check upon Congress's deportation power.

Both *Galvan* and *Harisiades* concerned substantive due process challenges to the terms or classifications embodied in congressional *statutes*. Several subsequent cases have confirmed that there appears to be little or no substantive due process review available for such congressional choices. See, e.g. *Buchowiecki-Kortkiewicz v. United States INS*, 455 F.2d 972, 972 (9th Cir.), *cert. denied*, 409 U.S. 858, 93 S.Ct. 141, 34 L.Ed.2d 103 (1972); *Matter of Longstaff*, 716 F.2d 1439, 1442-43 (5th Cir. 1983) (dicta as to immigration; case dealt with naturalization), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984); *Anetekhai v. INS*, 876 F.2d 1218, 1222 (5th Cir.1989) (*Anetekhai*). Moreover, courts have repeatedly held that there is no substantive due process right not to be deported. See, e.g., *Doherty v. Meese*, 808 F.2d 938, 944 (2d Cir.1986); *Linnas v. INS*, 790 F.2d 1024, 1031 (2d

Cir.), *cert. denied*, 479 U.S. 995, 107 S.Ct. 600, 93 L.Ed.2d 600 (1986); *Bassett v. United States INS*, 581 F.2d 1385, 1386 (10th Cir.1978). In our circuit, we have summarily rejected such challenges to deportation orders numerous times. See, e.g., *Tsimbidy-Rochu v. INS*, 414 F.2d 797, 798 (9th Cir.1969) (per curiam); *Rodriguez-Romero v. INS*, 434 F.2d 1022, 1024 (9th Cir.1970) (per curiam), *cert. denied*, 401 U.S. 976, 91 S.Ct. 1199, 28 L.Ed.2d 326 (1971); *MacKay v. Turner*, 283 F.2d 728, 728 (9th Cir.1960) (per curiam).

In three subsequent cases dealing with both equal protection and substantive due process challenges under the fifth amendment, the Supreme Court both reaffirmed and clarified the principles of *Galvan* and *Harisiades*. *Fiallo*, 430 U.S. at 792-93 & n. 4, 97 S.Ct. at 1478 & n. 4; *Hampton*, 426 U.S. at 99-103, 96 S.Ct. at 1903-05; *Mandel*, 408 U.S. at 766-67, 769-70, 92 S.Ct. at 2583-84, 2585. We read *Hampton*, *Fiallo* and *Mandel* as indicating that the substantive component of the due process clause does operate as some limited constraint on congressional power, though the scope of judicial review on this basis is extremely narrow. See *Fiallo*, 430 U.S. at 793 n. 5, 795 n. 6, 97 S.Ct. at 1478 n. 5, 1479 n. 6; *Hampton*, 426 U.S. at 101, 96 S.Ct. at 1904; *Mandel*, 408 U.S. at 769-70, 92 S.Ct. at 2585 (excludable alien).

Having determined that the substantive component of the fifth amendment's due process clause has some application, in a limited way, to the INS's detention regulation, we next consider the level of scrutiny which is applicable to the regulation. The parties assume that the usual framework of analysis for substantive due process applies. This analytical framework requires a threshold choice between two available levels of scrutiny. When the government "impairs the exercise of a fundamental right," we apply a strict scrutiny standard, which requires the

government to "prove to the Court that the law is necessary to promote a compelling or overriding interest." *Christy v. Hodel*, 857 F.2d 1324, 1329 (9th Cir.1988) (*Christy*) (citations and internal quotations omitted), *cert. denied*, 490 U.S. 1114, 109 S.Ct. 3176, 104 L.Ed.2d 1038 (1989). However, if there is no infringement of a fundamental right, we apply a rational relation test, according to which "the law need only rationally relate to any legitimate end of government." *Id.* (citations and internal quotations omitted). The Supreme Court recently has advised against expanding the list of fundamental rights which have attenuated roots in the language of the Constitution. *Bowers v. Hardwick*, 478 U.S. 186, 194-95, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

Having assumed that the traditional substantive due process framework applies, the parties go on to offer different definitions of the right at stake. Flores claims abridgement of a fundamental right to be free from physical restraint—a right to physical liberty. The INS disagrees, contending that the right claimed is a right of minors in deportation proceedings to be released to unrelated adults. While Flores argues that the right to be free from physical restraint is a fundamental right, the INS contends that the right to be released to an unrelated adult is not fundamental.

We agree with the INS that the right at stake is the right to be released to an unrelated adult. In a substantive due process analysis, the right at stake must be defined narrowly. See *Christy*, 857 F.2d at 1327-30 (in substantive due process challenge to Endangered Species Act, rejecting plaintiff's definition of asserted right as right "to possess and protect property," and defining right at stake

narrowly as “right to kill federally protected wildlife in defense of property”); *see also* *Almario v. Attorney General*, 872 F.2d 147, 151 (6th Cir.1989) (*Almario*) (in rejecting argument that Immigration Marriage Fraud Act violates due process by unreasonably burdening “fundamental right to marry,” stating that “the Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in this country”). The INS’s regulation does not bar release of all alien juveniles. It bars release of alien juveniles who are likely to abscond or who, though not likely to abscond, do not have an identifiable parent, legal guardian or adult relative who can accept custody or designate an appropriate custodian. Moreover, Flores has cited no case to support the proposition that the Constitution ensures a fundamental right of alien juveniles in deportation proceedings to be released to unrelated adults. Given the Constitution’s assignment of the plenary political power over deportation to the legislative and executive branches, it is clear that no such right exists. As the Supreme Court stated in *Diaz*, “[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond [in the immigration area] to changing world conditions should be adopted only with the greatest caution.” 426 U.S. at 81, 96 S.Ct. at 1892 (footnote omitted). In light of the Court’s admonition in *Hardwick*, we hold that there is no such “fundamental” right in this case.³

³ The dissent disagrees with the narrow way we characterize the right at stake in this case. The dissent suggests that our analysis in determining the right at stake conflicts with the approach used by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), *New York Times v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), and *Wisconsin v. Yoder*,

406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). *Infra* at 1343. Yet in all three of those cases, the right at stake was already rooted in the text of the Constitution—namely, in the first amendment. We do not claim that textually rooted rights should be characterized more narrowly than the text suggests; rather, we simply hold that in dealing with *unenumerated* substantive due process rights, where there exists no textual guidance, it is proper to construe rights narrowly.

The dissent argues that *Hardwick* has no applicability to this case. *Infra* at 1019-1020. We disagree. *Hardwick* clearly demonstrates that, in the area of substantive due process, the list of “fundamental rights” is to be construed narrowly. This is plainly evidenced by a comparison of the majority and dissenting opinions in *Hardwick*. The dissent’s position—that the right at stake should be defined at the highest rather than the lowest level of generality—is the same position as that taken by Justice Blackmun in his dissent in *Hardwick*. In the first paragraph of that dissent, Justice Blackmun takes issue with the majority’s characterization of the right at stake as “a fundamental right to engage in homosexual sodomy.” 478 U.S. at 199, 106 S.Ct. at 2848 (internal quotations omitted). Instead, he would characterize the right at a much higher level of generality: “‘the right to be let alone.’” *Id.*, quoting, *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). The majority in *Hardwick* properly rejected this broad characterization of the right in favor of the narrower formulation. The majority opinion in *Hardwick* thus provides solid support for our decision to characterize the substantive due process right narrowly.

The dissent also contends that the right to “liberty” or “physical liberty” is enumerated in the text of the Constitution and must therefore be considered a fundamental right. We find no support for this position. While it is true that the fifth and fourteenth amendment due process clauses mention the word “liberty,” this does not mean that the “right to liberty” is a free-floating fundamental substantive due process right. Rather, as Justice Scalia has recently reminded us, “[t]he text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty ‘without due process of law.’” *Cruzan v. Director, Missouri Department of Health*, — U.S. —, —, 110 S.Ct. 2841, 2850, 111 L.Ed.2d 224 (1990) (Scalia, J., concurring). To hold otherwise

would mean, among other things, that courts would be required to review the sentence of every prisoner incarcerated in the United States under strict scrutiny so as to ensure that their fundamental substantive due process "right to liberty" was not being infringed.

The dissent concludes that the children possess a fundamental substantive due process right to "freedom from physical restraint." *Infra* at 1019. The dissent claims that while there may be disagreement over the term "liberty" in the Constitution, there is "no dispute" that "its core reference is to freedom from physical restraint, and that the interest is fundamental." *Id.* While this may be true in the procedural due process context, it is not true in the substantive due process context. No court has ever recognized a fundamental substantive due process right to physical liberty. Not surprisingly, therefore, the dissent cites no compelling authority in support of this sweeping assertion. The dissent relies primarily upon *United States v. Salerno*, 481 U.S. 739, 751, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987), to support this argument. Yet a few lines after the passage quoted by the dissent, the Supreme Court stated that "we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (emphasis added), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). The Court in *Salerno* thus unequivocally rejects the idea advanced by the dissent that there exists a fundamental right to physical liberty. Certainly, if, as the Court holds in *Salerno*, pretrial detention does not implicate the "fundamental right" to physical liberty urged by the dissent, such a fundamental right cannot be said to exist.

The dissent also cites *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989), in support of its assertion. *Infra* at 1020. In *DeShaney*, however, all the Court held is that the state's act of physically restraining an individual "trigger[s]" the protections of substantive due process. *Id.* The Court did not hold that individuals restrained by the state possessed a fundamental right to physical liberty, but rather that, once they were restrained, substantive due process required that they should be provided with "basic human needs." *Id.* 109 S.Ct. at 1005.

This conclusion is consistent with the Supreme Court's holdings regarding the constitutional rights of children. Recognizing that children possess "fundamental rights which the State must respect," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511, 89 S.Ct. 733, 739, 21 L.Ed.2d 731 (1969) (free speech rights); see also *Bellotti v. Baird*, 443 U.S. 622, 633, 99 S.Ct. 3035, 3043, 61 L.Ed.2d 797 (1979) (*Bellotti*) (plurality) ("A child merely on account of his minority, is not beyond the protection of the Constitution."), is "but the beginning of the analysis." *Bellotti*, 443 U.S. at 633, 99 S.Ct. at 3043. The Supreme Court has often stated that constitutional rights of children are not coextensive with those of adults. In *Schall v. Martin*, 467 U.S. 253, 263-66, 104 S.Ct. 2403, 2409-11, 81 L.Ed.2d 207 (1984) (*Schall*), the Court, acknowledging that the state may restrict a child's liberty interest in order to secure that child's welfare, upheld the constitutionality of a New York statute authorizing the pretrial detention of juveniles under certain narrow circumstances. The Court reasoned:

The juvenile's . . . interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial. . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children,

Finally, the dissent cites for support *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, 1413-14, 51 L.Ed.2d 711 (1977). *Infra* at 1020. Yet since *Ingraham* was a procedural due process case, it obviously fails to support the assertion that there exists a fundamental, substantive due process right to freedom from physical restraint.

In short, the dissent advances no authority for the proposition that the right to be free from physical restraint is recognized as an enumerated, or even unenumerated, substantive due process right. In the absence of such authority, we cannot accept the dissent's assertion.

by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

Id. at 265, 104 S.Ct. at 2410 (citations omitted), quoting *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401, 71 L.Ed.2d 599 (1982).

In *Bellotti*, a plurality of the Supreme Court articulated three reasons "justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." 443 U.S. at 634, 99 S.Ct. at 3043. While only three other Justices joined Justice Powell's plurality opinion in *Bellotti*, neither the four concurring Justices nor the lone dissenter disputed Justice Powell's summary of rationales reflected in the case law for affording children lesser constitutional rights than adults. Because the three *Bellotti* factors represent the Court's only reasoned discussion to date of the possible bases for distinguishing minors' constitutional rights from adults, they are frequently cited as controlling in cases that require such a distinction. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir.1981); *McColleston v. City of Keene*, 586 F.Supp. 1381, 1385-86 (D.N.H.1984).

In our view, all of the *Bellotti* factors are implicated in this case, but especially the first. The INS's regulation governing the detention of minors is based at least in part upon a concern for the "peculiar vulnerability" of alien

minors. See *Bellotti*, 443 U.S. at 635, 99 S.Ct. at 3043 ("Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability. . ."). We view the INS's regulation as an exercise of governmental power which takes into account the peculiar vulnerability of alien children. The exercise of such power does not encroach upon a fundamental right.

Since there is no fundamental right implicated in this case, we must apply minimal scrutiny to the INS regulation, and consider whether the regulation was rationally related to any legitimate end of government. But, once more, we must fashion our review based upon the type of case before us. Even where a fundamental right is arguably at stake, there is a strong presumption for rational basis review in the context of immigration cases. See *Adams v. Howerton*, 673 F.2d 1036, 1041 (9th Cir.) (declining to consider whether homosexual couple had fundamental "right to marry" which was infringed by immigration statute, and holding that "[e]ven if it were [a fundamental right], we would not apply a strict scrutiny standard of review to the statute" given Congress's plenary power over immigration), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982); see also *Anetekhai*, 876 F.2d at 1218 (Marriage Fraud Amendments to the Immigration and Nationality Act); *Almario*, 872 F.2d 147 (same); *Ademi v. Moyer*, 1989 WL 56904, 1989 U.S. Dist. LEXIS 5953 (N.D.Ill. May 22, 1989) (same); *Escobar v. Immigration & Naturalization Service*, 700 F.Supp. 609 (D.D.C.1988) (same); *Smith v. Immigration & Naturalization Service*, 684 F.Supp. 1113 (D.Mass.1988) (same).

Flores argues that the INS's regulation is not rationally related to a legitimate end of government. The INS cites four interests served by the regulation: (1) ensuring the minors' appearance at future deportation proceedings; (2) fostering the welfare or safety of the detained minors; (3) insulating the INS from liability for harm befalling released minors; and (4) administrative economy, since the INS does not have the resources to conduct the home studies necessary to determine whether adults outside the regulation would be responsible. These are all legitimate ends for the INS to pursue in this context, and the regulation is rationally related to these goals.

Flores contends, however, that the INS presented no evidence that the regulation furthered any of the asserted interests. Flores also argues that the actual purpose behind the regulation is to capture the illegal alien parents of detained minors, though Flores has pointed to nothing in the record which supports this contention. In addition, Flores argues that the INS's cost efficiency interest is undermined by the cost of detention, which can reach \$100 per day per child. All three of these contentions, however, reflects a misunderstanding of the minimum scrutiny test. Under that test, a law "will be upheld if the court can hypothesize any possible basis on which the legislature might have acted." *Christy*, 857 F.2d at 1329; *see also id.* at 1328 n.2; *United States v. Barajas-Guillen*, 632 F.2d 749, 754 (9th Cir.1980) (*Barajas-Guillen*). "Since the court itself may postulate a basis for the legislation, satisfaction of the rationality test should be deemed a legal, rather than a factual, issue." *Christy*, 857 F.2d at 1328 n. 2; *see also Barajas-Guillen*, 632 F.2d at 753-54. Moreover, once the interests or purposes served are delineated, Flores bears the burden of demonstrating that there is no rational connection between these purposes and the regulation. *Harrah Independent School District v. Martin*, 440 U.S. 194,

198, 99 S.Ct. 1062, 1064, 59 L.Ed.2d 248 (1979) (*per curiam*). Since Flores has failed to carry this burden, we conclude that the regulation is indeed rationally related to the interests noted above.

Bearing in mind the very limited nature of our substantive due process review in this field of law, it is clear that Flores's substantive due process challenge to the regulation must be rejected. To the extent the district court based its ruling on this prong of due process law, it must be reversed.

B.

The INS next challenges the district court's summary judgment on Flores's *procedural* due process claim. Aliens in deportation proceedings enjoy certain procedural due process rights under the fifth amendment. *Baires v. INS*, 856 F.2d 89, 90 (9th Cir.1988). In order to understand Flores's procedural due process claim, we must briefly review the INS's existing procedures both for arresting and for setting release and bond conditions of aliens who are believed to be deportable.

A deportation proceeding is commenced when the INS files with the Office of the Immigration Judge, an Order to Show Cause why the respondent should not be deported. 8 C.F.R. § 242.1(a) (1988). Under 8 U.S.C. § 1252(a)(1), the Attorney General is empowered to issue warrants for arrest and take into custody aliens suspected of being deportable. The regulations authorize the issuance of an arrest warrant once the Order to Show Cause is issued. *See* 8 C.F.R. § 242.2(b)(1) (1988).

By statute, an immigration officer is also empowered to arrest *without a warrant*:

any alien in the United States, if he has reason to believe that the alien so arrested is in the United States

in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States. . . .

8 U.S.C. § 1357(a)(2). For aliens arrested without a warrant, the applicable regulations provide that the alien must be examined as provided in section 1357(a)(2) "by an officer other than the arresting officer" (examining officer) unless "no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay," in which case the arresting officer may examine the alien. 8 C.F.R. § 287.3 (1988). The examining officer is an INS officer, not an immigration judge (IJ). See 8 C.F.R. § 1.1(1) (1988). If the examining officer "is satisfied that there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws," then the officer will take steps to initiate deportation proceedings. 8 C.F.R. § 287.3 (1988). The regulations do not define "prima facie evidence." Once the examining officer has determined that prima facie evidence exists, the alien is advised of various rights and informed that a decision on custody will be made within 24 hours. *Id.* The alien is also informed that his case "shall be presented promptly, and in any event within 24 hours, for a determination as to whether there is prima facie evidence [of illegal presence] and for issuance of an order to show cause and warrant of arrest as prescribed in Part 242 of this chapter." *Id.*

The amount of bond and conditions of release are set by INS officials. Under the regulations, a custody or bond decision for aliens arrested without a warrant must be

made within 24 hours after the appearance before the examining officer. 8 C.F.R. § 287.3 (1988). The regulation governing release and bond decisions is 8 C.F.R. § 242.2 (1988). It provides that once release or bond conditions are set, the alien "may apply to any officer authorized by this section" for release or an amelioration of bond conditions. 8 C.F.R. § 242(b) (1988). Alternatively, an alien detained or released on bond may obtain review in a bond redetermination hearing before an IJ. 8 C.F.R. § 242.2(c) (1988). Such a hearing is available only "upon application by" the alien. *Id.* The regulations do not require the IJ to decide motions relating to bond conditions within any specific time. *Id.* Adverse decisions in redetermination hearings may be appealed to the Board of Immigration Appeals (BIA) by either the alien or the INS, though there is no time limit within which the BIA must render its decision. *Id.*

With this framework in mind, we turn to the parties' arguments. Apparently relying on both *Gerstein v. Pugh* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), Flores argued in the district court that the INS was constitutionally required to provide "prompt, mandatory, neutral and detached" review to each class member following arrest of (1) whether probable cause to arrest existed, (2) whether imposition of the release or bond condition was necessary to ensure future appearance, and (3) whether any suitable adult was available to whom the juvenile could be released. Flores also challenged the INS's alleged failure to provide prompt written notice to released juveniles of the bond conditions which had been imposed.

In granting summary judgment to Flores, the district court, with virtually no explanation of its reasons, ordered the INS to do the following:

1. Defendants . . . shall release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party. Prior to any such release, the defendants may require from such persons a written promise to bring such minor before the appropriate officer or court when requested by the INS.

2. Whenever a minor is released as aforesaid, the minor shall be promptly advised in writing in a language he understands of any restrictions imposed upon his release.

3. Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor.

Paragraph 1 of the order was premised on the district court's determination that the INS's regulation violated substantive due process. In the preceding section, we explained our reasons for reversing that part of the order. The relief granted by paragraph 2 is inextricably linked to the relief granted by paragraph 1. Paragraph 2 requires the INS to provide notice of the bond conditions imposed under its regulation, but apparently only to those who would be *released* pursuant to district court's modification of the regulation.

Paragraph 3 requires an "administrative hearing" which must occur "forthwith." It is not entirely clear whether this administrative hearing is to occur before an IJ ("special examining officer"), or instead may be conducted before a second immigration officer. We assume that the district judge intended the former. The record supports this inter-

pretation. Moreover, the alternative interpretation would deprive the injunction of much practical effect, since at least those aliens who are arrested *without* a warrant already are entitled to have probable cause reviewed by a second immigration officer "without unnecessary delay." See 8 U.S.C. § 1357(a)(2). The purpose of the hearing ordered by the district court is to determine (1) probable cause for the juvenile's arrest and (2) the need for any restrictions placed upon the juvenile's release. Finally, paragraph 3 apparently mandates an administrative hearing in every case. That is, the hearings are automatic, need not be requested, and perhaps cannot be waived. Paragraph 3 appears to be based on *Gerstein*.

In *Gerstein*, the Supreme Court held that the fourth amendment requires review, by a neutral and detached magistrate, of probable cause for arrest prior to any "extended restraint of liberty following arrest." 420 U.S. at 114, 95 S.Ct. at 863. The district court apparently assumed that *Gerstein* applies to civil deportation proceedings. The court may have believed that the INS examining officer was not "neutral and detached" under *Gerstein*. The rationale would seem to be that because both the INS officers who arrest the aliens and those who make a determination as to whether there is *prima facie* evidence that will allow the INS to detain the alien are law enforcement officials, they are incapable of being neutral or impartial. The INS responds that (1) the role of INS officers is equivalent to a committing magistrate's role, and (2) the requirement of *prima facie* evidence is more stringent than probable cause.

We need not resolve this dispute since we conclude that *Gerstein* does not apply to deportation proceedings. The precise issue in *Gerstein* was "whether a person arrested and held for *trial* under a prosecutor's information is con-

stitutionally entitled to a judicial determination of probable cause for *pretrial* restraint of liberty." 420 U.S. at 105, 95 S.Ct. at 858 (emphasis added). The Court in *Gerstein* itself stressed that its holding was not readily transferable to civil proceedings. *See id.* at 125 n.27, 95 S.Ct. at 869 n. 27 ("The Fourth Amendment was tailored explicitly for the criminal justice system. . . . Moreover, the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures . . . presented in . . . [Justice Stewart's] concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.") (emphasis in original).

It is true that in *Schall* the Court cited *Gerstein* numerous times in upholding pretrial detention of juveniles in civil proceedings under a New York statute. *Schall*, 467 U.S. at 264, 274-77 & nn. 27-28, 104 S.Ct. at 2515-16 & nn. 27-28. The Court never declared, however, that *Gerstein's* standards directly applied to civil juvenile proceedings. Instead, the Court's discussion recognized that *Gerstein* had arisen in a different context. *See id.* 467 U.S. at 274-75, 104 S.Ct. at 2415 (recognizing that *Gerstein's* holding applied to *adults*); *see also id.* at 275 ("*Gerstein* arose under the Fourth Amendment, but the same concern with 'flexibility' and 'informality,' while yet ensuring adequate predetention procedures, is present in this case."). Thus, in *Schall*, the Court merely held that the New York statute "provide[d] far more predetention protection for juveniles that we found to be constitutionally required for a probable-cause determination for adults in *Gerstein*." *Id.* 467 U.S. at 275, 104 S.Ct. at 2415. As we read *Schall*, it did not hold that *Gerstein* applied to civil proceedings.

The Supreme Court's decision in *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (*Salerno*), is also inapposite. In *Salerno*, an adult criminal detainee challenged on constitutional grounds a provision of the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, permitting dangerous felons to be detained before trial without bail. *See* 18 U.S.C. § 3142. The Court's procedural due process analysis in *Salerno* was geared toward the rights of adult citizens facing detention in the criminal context. *See Salerno*, 481 U.S. at 747-52, 107 S.Ct. at 2101-04. The situation before us in this case involves the rights of juvenile aliens facing detention in the civil context. For reasons discussed above, the quantum and type of due process protection afforded alien minors in civil deportation proceedings is different from that afforded adult criminals. We therefore do not need to follow the procedural due process analysis used by the Court in *Salerno* in order to decide this case.

Nor is it unusual that deportation proceedings, which by nature are not only "purely civil" but also a unique *kind* of civil proceeding, would feature fewer procedural due process protections than a criminal trial. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) (exclusionary rule does not apply in deportation hearings). Other examples of criminal trial protections that do not apply in deportation proceedings include the quantum of proof, the need of *Miranda* warnings before a voluntary statement is given by the respondent, the *ex post facto* clause; and the inadmissibility of involuntary confessions. *Id.* 468 U.S. at 1039, 104 S.Ct. at 3483. Because deportation proceedings are civil, "the full panoply of due process rights [are] not applicable. . . ." *Jean*, 727 F.2d at 974.

We are unpersuaded by several cases that have either assumed, without analysis, that *Gerstein* applies to INS

probable cause determinations, or have drawn analogies between INS officers on the one hand and committing magistrates in a criminal context on the other. For example, in *Min-Shey Hung v. United States*, 617 F.2d 201, 202 (10th Cir.1980), the court examined the identical procedure that is at issue here, and found it sufficient to meet constitutional standards. The court likened the District Director's decision to a magistrate's. The decision

is basically the same as a criminal proceeding before a magistrate on probable cause. Probable cause was thus also determined by the District Director. This, in our view, was sufficient to meet the constitutional standards and to commence the deportation proceedings. Probable cause for the arrest was so determined.

Id. At the same time, however, the court, in citing *Gerstein*, acknowledged that it had focused on "Florida criminal procedures," and therefore articulated a "standard applicable to a state." *Id.*; see also *Arias v. Rogers*, 676 F.2d 1139, 1142 (7th Cir.1982) (erroneously concluding that examining officer mentioned in 8 U.S.C. § 1357(a)(2) was IJ rather than INS official, and analogizing immigration judge to "committing magistrate in criminal proceeding"). We conclude that *Gerstein's* "neutral and detached" magistrate requirement is inapplicable to deportation proceedings.

Our holding is in keeping with the Supreme Court's forceful dicta in *Abel v. United States*, 362 U.S. 217, 230-34, 80 S.Ct. 683, 692-95, 4 L.Ed.2d 668 (1960). In *Abel*, though professing not to reach the issue of whether an INS arrest warrant was invalid because it failed to comply with the fourth amendment's requirements for warrants, the Court nonetheless devoted five pages to rejecting petitioner's claim. See, e.g., *id.* at 233, 80 S.Ct. at 694 ("[T]here remains overwhelming historical legislative

recognition of the propriety of administrative arrest for deportable aliens such as petitioner."); see also *Jean*, 727 F.2d at 974 n. 24; *Spinella v. Esperdy*, 188 F.Supp. 535, 540-41 (S.D.N.Y. 1960).

The district court based its ruling largely on *Gerstein*. It did not explicitly test the INS procedures incident to detention decisions by balancing the three factors outlined in *Mathews*. *Mathews* instructs that a court should weigh: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the interest through the procedures used, and the probable value of additional or substitute safeguards; and (3) the governmental interest, which includes the function involved and the fiscal and administrative burdens that additional or substitute procedures would entail. 424 U.S. at 334-35, 96 S.Ct. at 902. The *Mathews* test is the general test for procedural due process and is applicable to INS procedures such as those involved in this case. See *Landon v. Plasencia*, 459 U.S. 21, 36-37, 103 S.Ct. 321, 331-32, 74 L.Ed.2d 21 (1982).

We will not undertake the *Mathews* balancing in the first instance. The parties have not briefed this issue in detail. See *id.* 459 U.S. at 36-37 & n. 9, 103 S.Ct. at 331 & n. 9 (declining to consider whether exclusion hearing afforded permanent resident alien returning from 2-day trip abroad met *Mathews* standard since parties devoted attention to other issues on appeal and "[p]recisely what procedures are due . . . has not been adequately developed by the briefs or argument"). Moreover, the district court should have the first opportunity to reconsider in light of our invalidation of paragraph 1 of the order. We therefore remand this issue to the district court, where the parties will have a fuller opportunity to explore the issue.

REVERSED AND REMANDED.

FLETCHER, Circuit Judge, dissenting:

I respectfully dissent. As Chief Justice Rehnquist observed, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 2105, 95 L.Ed.2d 697 (1987). The majority goes to great lengths to deny liberty to children whose only possible offense is their alienage.

The facts of this case are among the most disturbing I have confronted in my years on the court. Children are being held in detention by the INS for as long as two years in highly inappropriate conditions out of a professed concern for their welfare. When the case first came before the district court, the only requirement for institutionalizing a child was a determination by an INS agent—not a judge—that there was prima facie evidence of the child's deportability. Upon such a slender showing, children were put into "detention centers" for indeterminate periods of time, deprived of education, recreation, and visitation, commingled with adults of both sexes and subjected to strip searches with no showing of cause. In the INS's Western Region, a child could escape such confinement only if a parent or legal guardian, or "in unusual and extraordinary cases" a responsible adult, came forward to seek release. The rationale for this regulation was to assure the "minor's welfare and safety" and to protect the agency from legal liability.

Only after suit was brought against it did the INS agree to modify the conditions of confinement and the treatment of the children during detention. The district court approved a partial settlement whereby the INS agreed to provide education, reasonable visitation rights, and recreation as well as to cease commingling detained minors with unrelated adult prisoners. Subsequently, without

agreement of the INS, the court ordered the INS to cease strip searching the children unless it had reasonable suspicion to believe they were concealing weapons or contraband. The INS has not appealed that order.

In light of the INS's announced intention to promulgate new rules governing minors' pre-hearing release, the district court agreed to postpone ordering the agency in the Western Region to release children awaiting their deportation hearing to responsible adults (although that was the practice followed by the INS in other regions of the country and was the nationwide policy regarding children held for exclusion hearings). The INS's final regulations, however, allowed release to responsible adults other than parents, legal guardians, and adult relatives only in "unusual and compelling circumstances" and did nothing to provide for neutral and detached evaluation of the basis for determining the likelihood that the detained minors were deportable.

The district court concluded that the final regulations did not satisfy minimum due process requirements. Judge Kelleher entered an order requiring the INS (1) to release minors otherwise eligible for release to their parents, guardian, custodian, conservator, or other responsible adult party, (2) to advise those released promptly in writing of the conditions of their release, and (3) to hold a prompt administrative hearing to determine probable cause for their arrest and the need for any restrictions to be placed upon their release. This was a simple, sensible, minimally intrusive direction to the agency. I would uphold it rather than search for ways to reverse.

The result the majority reaches is deeply troubling. Equally troubling, however, are the analytic framework and standard of review adopted by the majority; they will reverberate well beyond the issues presented in this particular case.

I

The majority opinion rests its holding on Congress' plenary power over matters of immigration and naturalization and on the broad discretion Congress has delegated to the Attorney General and the INS to carry out its decisions to admit or exclude certain groups of persons. I agree with the majority that the INS has broad authority and discretion.

I also agree with the majority's rejection of the appellees' statutory argument that Congress limited the agency to promulgating regulations that would insure the appearance of minors at their upcoming deportation hearings. This, however, disposes only of appellees' claim that the INS exceeded the scope of its statutory authority.

The INS's discretion also is limited by the Constitution. Despite Congress' broad powers in matters of immigration, the Constitution extends certain protections to all persons within the jurisdiction of the United States. For instance, the protections of the Fifth and Fourteenth Amendments extend to aliens physically present in the United States. *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1975) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law."); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Baires v. INS*, 856 F.2d 89, 90 (9th Cir. 1988). Nor are appellees ineligible for constitutional protection because of their youth. *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984); *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Despite these clear holdings and despite the

fact that laws that adversely treat aliens or that infringe on a basic constitutional right warrant heightened scrutiny, the majority nevertheless concludes that the INS's regulations are largely beyond judicial review. In arriving at its conclusions, the majority makes two errors in its constitutional analysis.

A

First, the majority misinterprets the scope and overlooks the source of the executive and legislative branches' discretion. After establishing that the subject matter of the challenged regulations (the manner of detention of suspected illegal aliens) is not outside the scope of the INS's statutory authority, a proposition with which I fully agree; the majority proceeds to discuss another subject entirely, Congress' broad authority to determine who should be allowed to enter and remain in the country. The opinion then moves from the discussion of Congress' unfettered power to decide *whom to admit* to the United States to the conclusion that since the due process clause does not constrain congressional power to determine who may enter, this somehow determines the due process rights of individuals present in the United States awaiting deportation proceedings and constrains judicial review of claimed violations of their due process rights and conditions of confinement.

In effect, the majority is moving from the uncontroverted propositions that the political branches have plenary authority over deciding whom to admit into the country and that such political decisions are largely immune from judicial review, to the unsupportable conclusion that how it treats those whom it detains while the deportation process is underway is likewise beyond judicial review. This is an unwarranted leap.

The majority exhaustively reviews the relevant statutes, legislative history, and case law to establish the general proposition that the legislative and executive branches have virtually unbridled authority over matters of immigration and naturalization. While it is true that the political branches have virtually unreviewable authority to decide whom to admit into the United States and whom to exclude, this does not mean they can do just anything to an individual while his status is under review. A decision by the political branches to admit more Nigerians than Irish into the United States may not be vulnerable to an Equal Protection challenge. But a decision to incarcerate all Nigerians awaiting deportation hearings but not Irish would be accorded no such judicial deference. The courts' deference to the "plenary power" of Congress is limited essentially to Congress's decision regarding *who* is excludable; it does not extend to their treatment during the deportation process. The very Supreme Court cases upon which the majority relies makes this clear. See e.g., *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1976) (upholding law granting preferential immigration status to natural mothers but not natural fathers of children born outside of marriage); *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952) (upholding Alien Registration Act of 1940, which authorized deportation of aliens because of their membership in the Communist Party); *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954) (upholding Internal Security Act of 1950 which provided for the deportation of legally resident aliens because they had once been members of the Communist Party even though unaware of the party's advocacy of violent overthrow of the government). The cases the majority cites in which the Supreme Court recognized that "Congress regularly makes rules that would be unacceptable if applied to citizens," likewise refer to legislative

decisions regarding which aliens to exclude from the country. For instance, in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) the Supreme Court affirmed the Attorney General's denial of a visa for a Marxist alien scholar even though such action would violate the First Amendment if applied to a U.S. citizen.

The respective roles of the three branches is readily understandable once one recognizes that congressional and executive authority over immigration stems from the allocation within our scheme of separation of powers and federalism, to the national political branches of all authority over foreign relations and national security. This both "limits and justifies congressional and executive authority. The reason for the substantial deference that the judiciary owes to the other two branches in these areas has been recognized time and again by the Supreme Court. In *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1975), the Court observed that the political branches of the federal government are responsible for our relations with foreign powers and cautioned that constitutional law must not unnecessarily inhibit the flexibility of the political branches to respond to changing political and economic global conditions. The *Diaz* Court relied on the reasoning of a 1952 case, *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, in which the Court noted that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 588-89, 72 S.Ct. at 518-19. Similarly, in *Galven* [*sic*], 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1953), the Court deferred to the broad

power of Congress over sovereignty, foreign relations, and national security.

The majority quotes these cases and others to support its view that the judiciary must defer to the INS in all matters: "Because Congress's power over immigration is plenary and political in nature, the exercise of that power is subject 'only to narrow judicial review.'" (Maj.Op. at 1004). What the majority glosses over, however, is that those cases limit the INS's claim to deference to those areas that affect our country's relations with foreign powers or our national security.¹

The majority suggests without quite saying it that Congress wished to give and the courts have allowed the INS virtually unreviewable discretion to hold arrested aliens in custody prior to their deportation hearings. The majority quotes extensively from Congressional committee reports of the Hobbs Bill, a defeated precursor to the 1950 Subversive Activities Control Act (of which the present § 1252 is a derivative of a derivative). The majority highlights those sections that express Congressional intent to grant the Attorney General "untrammelled authority" to impose conditions of release (such as requiring aliens to make periodic reports as to their location or to post more bond money) pending final determination of deportability. I question whether this statement, made in the 1950's, regarding discretion to impose conditions on those aliens released on bond is a useful aid to judicial interpretation of the effect of the current immigration act on the INS's discretion to refuse to release aliens under any condition. Even if it were, such legislative history that would infuse a

¹ As one commentator notes, "even the federal government cannot make free use of alienage classifications which do not relate to foreign policy." Rotunda, Nowak, and Young, *Treatise on Constitutional Law: Substance and Procedure*, § 18.12, at 494.

statute with an unconstitutional cast should be read suspiciously and narrowly. See *United States v. Witkovich*, 353 U.S. 194, 77 S.Ct. 779, 1 L.Ed.2d 765 (1957) (rejecting a literal reading of a provision of the Immigration and Nationality Act of 1952 where such a broad interpretation of the discretion granted the Attorney General would generate constitutional doubts as to the validity of the statute).

The majority also relies heavily on *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952), in which the Court, in reviewing the bond provisions of the Subversive Activities Control Act, agreed with the government that "Congress' intention [was] to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse." *Carlson* cannot be read as the majority suggests as conferring upon the INS unfettered authority over pre-hearing detention of aliens. The purpose of the Subversive Activities Control Act was to deport all alien Communists as a menace to the security of the United States. *Carlson* involved a challenge to the Attorney General's decision to hold aliens who were active Communists without bail pending determination of their deportability. The Attorney General justified the exercise of discretion to deny bail "by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.* at 543, 72 S.Ct. at 536. The Supreme Court upheld the pre-hearing detention out of deference to the Attorney General's national security authority: "As all alien Communists are deportable, like Anarchists, because of Congress' understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives

adequate grounds for detention." *Id.* at 541, 72 S.Ct. at 535. *Carlson* merely upheld the INS's detention of those individuals who pose a threat to the community or who are a "menace to the public interest." *Id.* at 541, 72 S.Ct. at 534. Where the Supreme Court subsequently has cited *Carlson*, it has given it a narrow interpretation. *United States v. Salerno*, 481 U.S. 739, 748, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (*Carlson* cited for proposition that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings."); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1983) (*Carlson* cited for proposition that the Eighth Amendment does not require bail to be granted in "certain" deportation cases). The majority's reliance on *United States Ex Rel. Barbour v. District Dir. of INS*, 497 F.2d 573 (5th Cir.1974) is likewise misplaced as that case also addressed the INS's authority to detain an alien believed to pose a risk to national security. (The Syrian government had notified U.S. authorities of petitioner's true identity as an officer of the Syrian Army accused of smuggling money.)

Where the INS acts outside this realm—as it does when it determines how the people whom Congress has decided will not be admitted into the United States are to be treated while they await deportation determinations as well as when it purports to act in the interest of alien children—the INS has no special claim to deference beyond that which we accord any other agency. Although protecting the children's welfare may be a statutorily permissible interest, the agency is entitled to no special deference in this area. Recent Supreme Court cases are in accord. Although reaffirming the political branches' virtually unreviewable authority over decisions as to which groups to exclude and whom to deport, the Court has struck down laws that imposed discriminatorily adverse

conditions or treatment of aliens while present in our country. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) the Court found that the Civil Service Commission regulation barring non-citizens from civil service employment unconstitutionally deprived resident aliens of liberty without due process in violation of the Fifth Amendment. The Court explicitly rejected the government's "primary submission that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." Similarly, in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, in striking down a state law withholding funds for the education of illegal alien children, the Court analyzed the degree of deference due this state law by contrasting it to the deference accorded federal legislative decisions which is derived from Congress' plenary authority over foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders. The Court noted that the "obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." The regulations at issue in this case present no delicate foreign policy issues. They do not impinge in any way on decisions as to which groups of people to admit or exclude from the country. Nor is there any claim made that these children pose a risk to our national security. The INS regulations at issue command no special deference.

B.

On the contrary, the agency's regulations should be more closely reviewed because they deprive a group traditionally subject to discrimination of their physical liberty; a quasi-suspect class is being deprived of a basic constitutional right. Either factor is sufficient to trigger height-

ened judicial scrutiny. Both are present here. The majority nonetheless insists we should apply a deferential standard of review. This second error also is critical. Perhaps less so to the outcome of this case—since the regulations could not pass even a rational relation test—than to the integrity of constitutional analysis.

I disagree profoundly with majority's characterization of the constitutional right at stake. The majority, starting from the premise that in substantive due process analysis, the right at stake must be defined narrowly, then defines the right claimed by appellees as "the right of alien juveniles in deportation proceedings to be released to unrelated adults." (Maj.Op. at 1007). The majority, unable to locate this phrase in the constitution or precedent, then reasons that there is no fundamental constitutional right implicated and that the regulations are subject to only minimal scrutiny. This analysis is, very simply, wrong.² The Constitution is not a civil code. Constitutional rights are not characterized at that level of specificity. To define the right as the majority does defines it out of existence. For its approach to constitutional analysis—which would apply in Equal Protection Clause analysis as well—the majority relies on two cases. It cites *Christy v. Hodel*, 857 F.2d 1324 (9th Cir.1988), for the proposition that the right at stake must be defined narrowly for the purposes of substantive due process analysis. What the court said was that strict judicial scrutiny of legislation is reserved for enactments that "impinge upon constitutionally protected rights." (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40, 93 S.Ct.

² Elsewhere, the majority concludes that there is no "substantive due process right not to be deported." This exemplifies the use of a straw person to obfuscate the real issue. This case is not about deportation; it is about pre-hearing detention.

1278, 1300, 36 L.Ed.2d 16 (1973)). *Christy* involved an alleged taking of property by an Interior Department Endangered Species Act regulation that prohibited the killing of grizzly bears. Plaintiffs alleged this deprived them of their constitutional right to defend their sheep. The District Court granted summary judgment for the government. Despite a well developed body of caselaw that guides the analysis of takings claims under the fifth amendment, the court analyzed the case as requiring the court to determine first whether the plaintiffs were alleging a "fundamental right." The plaintiffs urged that, since the Supreme Court had inferred a constitutional right to privacy despite the absence of express language in the constitution, this court should recognize a constitutional right to kill federally protected wildlife in defense of one's property. The court understandably declined to do so.

Christy should be read simply as a refusal to find that the fifth amendment protection of property rights embraces the right to be exempt from laws protecting endangered species. To the extent *Christy* is read as standing for a general proposition that rights must be defined narrowly in substantive due process cases, it is inconsistent with Supreme Court precedent. In *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1957) the Court did not consider whether there is a fundamental right against "forced disclosure of membership lists." Rather it analyzed the impact of state law on the fundamental right to "association." In *New York Times v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), the Supreme Court considered the impact of the government's action, not on the newspaper's right to publish a classified study on the United States policy-making in Viet Nam, but on the newspapers' right of freedom of the press. In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, the Court did not examine whether

there is a fundamental right to educate one's children at home once they have completed the eighth grade; it analyzed whether the state compulsory education law violated the right to free exercise of religion.

In the second case cited to support the majority's assertion that rights must be narrowly defined, *Almarino v. Attorney General*, 872 F.2d 147 (6th Cir.1989), the sixth circuit rejected plaintiffs' argument that the Immigration Marriage Fraud Act violates due process by unreasonably burdening the fundamental right to marry. The opinion does state that the constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in this country. However, the court merely was restating the holdings of previous cases, which concluded that the deportation of alien spouses did not unconstitutionally interfere with the right to marry, a right which the court recognized was fundamental. Finding that a constitutional right is not *violated* by a particular government action is quite different from denying the existence of the right.

Recent debates over which rights are "fundamental" have occurred in the context of deciding whether *unenumerated* rights—those rights not readily identifiable in the text of the Constitution or its amendments—such as the right to privacy, to association, to vote, or to obtain education, should qualify as fundamental.³ The analysis the majority has employed to define the right is suitable when the issue facing the court is whether an activity that is at the periphery of an already recognized right should be included in that category. See e.g., *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780 (does first amendment right to

³ The Court originally considered which individual rights are considered fundamental when it undertook the task of "selective incorporation" or making applicable to the states certain provisions of the Bill of Rights.

free speech include the right to wear a jacket with obscenities emblazoned on it); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (does right to free speech include right to make campaign expenditures); *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1981) (does liberty interest of institutionalized persons extend to training and habilitation necessary to ensure bodily safety and a minimum of physical restraint). It is obvious that this case requires neither type of analysis.

The majority also relies on *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) to support its characterization of appellees' right. *Hardwick* simply has no applicability to this case. In *Hardwick*, the Court advised against expanding the list of fundamental rights which have attenuated roots in the language or design of the Constitution and the Court refused to acknowledge that engaging in "homosexual sodomy" was included in the right to privacy. Although there may be disagreement over the far reaches of "liberty," there can be no dispute that its source is the text of the Constitution, that its core reference is to freedom from physical restraint, and that the interest is fundamental. This is apparent from all the decisions that have addressed substantive and procedural due process challenges to government's incarcerating or institutionalizing persons.

As the Supreme Court stated in *United States v. Salerno*, 481 U.S. 739, 751, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987), although the government has a strong interest in protecting the community from allegedly dangerous criminals, it must be balanced against "the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right." See also, *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989) ("In the substantive due process analysis, it is the State's affirmative

act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause . . ."); and *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977) (the "liberty interest . . . [has] always . . . been thought to encompass freedom from bodily restraint.")⁴

⁴ The majority relies on Justice Scalia's concurring opinion in *Cruzan v. Director, Missouri Department of Health*, ___ U.S. ___, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) as support for its definition of the constitutional right at issue in this appeal. The majority's reliance on the concurrence is surprising since all but Justice Scalia acknowledged that there are substantive limits on the ability of the state to infringe upon an individual's right to liberty. Additionally, *Cruzan* like *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) is a case that required the Court to further define the outer boundary of a recognized constitutional right, i.e. does the right to liberty encompass the "right to die?" It cannot seriously be argued that the right to liberty does not encompass the right to physical liberty.

Justice Scalia, in contrast to the other eight Justices, resisted finding a substantive due process right implicated and declined to agree that "due process" includes substantive limits. The majority quotes Justice Scalia: "[t]he text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*." *Cruzan* 110 S.Ct. at 2859. Yet a few lines after the passage quoted by the majority, Justice Scalia explains that he need not resolve whether the due process clause imposes substantive limitations on government action because "no substantive due process claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference." *Id.* 110 S.Ct. at 2859-60. Justice Scalia traces the history of the law regulating suicide and concludes that traditional Anglo-American law accorded it no protection. Even assuming the validity of Justice Scalia's analysis, it provides no support for the majority's position in the present case: an examination of the history of Anglo-American law would uncover a traditional definition of liberty that at the minimum encompassed physical liberty. As Justice Cardozo wrote, "Bills of rights give assurance to the individual of the preservation of

liberty. They do not define the liberty they promise. In the beginnings of constitutional government, the freedom that was uppermost in the minds of men was freedom of the body. . . . There went along with this, or grew from it, a conception of a liberty that was broader than the physical." B.N. Cardozo, "Paradoxes of Legal Science," in *Selected Writings of Benjamin Nathan Cardozo*, 311 (M.E. Hall ed. 1947)

The majority observes that the right to liberty is not a "free-floating fundamental substantive due process right." *Flores*, at 1007 n. 3. I agree. The Constitution does not forbid the detention of either adults or children. But it is axiomatic that the Constitution places a heavy burden upon the state to establish that deprivation of an individual's physical liberty is necessary. Traditionally this burden must be met by a showing of such things as the fact that the person committed a crime or that he must be committed because he poses a danger to society or to himself—determinations accompanied by strict procedural safeguards which are conspicuously absent here. This constitutional tradition is precisely why the pretrial detention at issue in *Salerno*, 481 U.S. 739, 107 S.Ct. 2095, was so controversial. It also explains why, even though the *Salerno* Court may not have used the terminology of strict scrutiny, it exercised careful and searching review of the need for the government's pretrial detention system. (Ironically, one is reminded of *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) where the majority purportedly applied strict scrutiny, while the dissent, applying only a reasonable relation test, found the government's invocation of national security insufficient justification for detaining aliens and citizens of Japanese descent.)

The problem with the majority's opinion is that it assumes that the government may incarcerate an individual unless he can establish the existence of an extraordinary reason why he should remain free. The history of our law teaches us otherwise: the state may not jail someone unless it can present an overriding justification for doing so. Or as Justice Cardozo wrote, "The subject was not to be tortured or imprisoned at the mere pleasure of the ruler." Cardozo at 311.

When the individuals detained have no representation in the political process, we have an added obligation to assure ourselves that the state is not acting improperly. There is a final irony in the majority's reliance on Justice Scalia's concurring opinion in *Cruzan*. Justice Scalia rhetorically asks what safeguard exists to prevent the State from passing oppressive laws such as imposing a tax of 100% on income above the subsistence level or requiring us to send our children to

II

I would find that the challenged INS regulations unconstitutionally deprive detained alien minors of their liberty. The regulation's effect is to mandate continuous pre-hearing detention of alien minors if there is no relative or legal guardian readily at hand to whom they can be released. We should be guided therefore by cases that have analyzed laws mandating pretrial detention in other situations: *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) and *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984).⁵ Al-

school for 10 hours a day. It is not, concludes Justice Scalia, the Due Process Clause. Instead, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan*, 110 S.Ct. at 2863. But who are the "loved ones" that the children imprisoned in INS detention camps can call upon to speak for them? Certainly not the politically powerful. Probably not even the enfranchised. The hardships the INS imposes in this case—even if they can be said to have the sanction of the democratic majority—fall on neither the majority nor their loved ones. Rather, they fall on a silent and isolated and helpless minority. Even if we were restricted to Justice Scalia's narrow version of individual liberty, the children would prevail.

⁵ It is true that all procedural criminal protections do not apply in deportation hearings. This is because a deportation hearing is a purely civil matter designed to determine a person's eligibility to remain in this country and is "intended to provide a streamlined determination of eligibility to remain in this country, nothing more." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984).

Once again, however, this appeal is not about deportation hearings. It is about placing people in physical custody while they await disposition of their status. Thus it more closely resembles criminal incarceration. Administrative warrants are issued for the aliens' arrest, searches are permitted incidental to the arrests, their physical liberty is taken away, and they may challenge the length of their custody by petition-

though in both *Salerno* and *Schall* the Court upheld the challenged pretrial detention rules, both cases are instructive in the framework of analysis and a useful standard of comparison they provide. The striking differences between the facts of *Schall* and *Salerno* and the facts here reveal that the INS's regulations do not lie on the permissible side of the boundary.

Schall involved a substantive and procedural due process challenge to a statute authorizing pretrial detention of minors found to pose a serious risk to the community. As the Court noted, although juvenile offenses are not crimes and proceedings against juvenile offenders are characterized as civil, some of the protections provided in the criminal context apply in such civil proceedings because restrictions are placed on juveniles adjudged delinquent. 467 U.S. at 257, n. 4, 104 S.Ct. at 2406, n. 4. The Court stated that a minor's interest in "freedom from institutional restraints" is "undoubtedly substantial," although qualified by the fact that children "are always in some form of custody." *Id.* at 265, 104 S.Ct. at 2410. Even though the minor's liberty interest is qualified, the Court will require a "legitimate and compelling state interest" to override it. *Id.* at 264, 104 S.Ct. at 2409. There are four governmental concerns that the Court has recognized as sufficient to override this liberty interest and to justify pretrial detention: (1) danger to the community if the indi-

ing for writ of habeas corpus. As the Tenth Circuit has concluded, detention of aliens pending deportation is properly analogized to incarceration pending criminal trial. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir.1981).

Significantly, in analyzing a federal pretrial detention statute in *Salerno*, 481 U.S. 739, 107 S.Ct. 2095, the Court relied on *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, which involved detention prior to civil proceedings. (The *Salerno* Court concluded that pretrial detention under the Bail Reform Act is regulatory, not penal.)

vidual were to be released; (2) risk of flight; (3) concern that the detainee might attempt to influence the tribunal illegitimately, for example, by intimidating witnesses or jurors; and (4) the need to protect a juvenile from the consequences of his criminal activity as well as to preserve and promote the welfare of the child. *Salerno*, 481 U.S. at 748-49, 107 S.Ct. at 2102; *Schall* 467 U.S. at 265-66, 104 S.Ct. at 2410-11. The government bears the burden of proving on an individualized basis that detention is required to serve these interests. The INS has not met its burden.

The stark contrast the INS regulations pose to the New York scheme upheld in *Schall* and the federal statute upheld in *Salerno* makes clear that the INS is acting well outside the realm found permissible by the Court. In *Schall* the New York statute authorized pretrial detention of accused juvenile delinquents based on a finding of a serious risk that the child would commit additional criminal acts before the return date. In upholding the law, the Court relied on the range of protections provided the juveniles. The child was guaranteed an individualized probable cause hearing to determine whether the child posed a risk to the community. There was a strictly limited period of pre-hearing detention and an expedited factfinding hearing. During their short stay (a *maximum* permissible detention of seventeen days for the most dangerous children and six days for less serious offenders) the children were subject to carefully regulated conditions of confinement providing for dormitory assignment based on age, size, and behavior, and they received counseling sessions, education and recreational programs. The protections upon which the Court relied to uphold pretrial detention in *Schall* are absent in *Flores*. The INS makes no attempt to expedite factfinding hearings, no time limits are imposed on the permissible period of detention. In fact, the INS admits it has no idea how long the children could be detained.

Other differences between *Schall* and the circumstances of this case further cut against the majority's position. First, the minors in question in *Schall* had been found to pose a danger to the community. If anything, the government has a *greater* interest in detaining juveniles accused of criminal activity than children it seeks only to deport; minors who are not even arguably a threat to the community should be subject to *fewer* restrictions on their physical liberty. Second, one of the explicit statutory purposes of the New York law was "to determine and pursue the needs and best interests of the child." *Id.* at 257, n. 4, 104 S.Ct. at 2406, n. 4. This justifies deference to the *parens patriae* role asserted by the government in a way that is markedly absent in the present case, where the explicit statutory purpose guiding the INS is to protect the national security and guide foreign relations.

The statute upheld in *Salerno*, 481 U.S. 739, 107 S.Ct. 2095, likewise is in sharp contrast to the regulations challenged here. The Court found the Bail Reform Act of 1984 constitutional because it was narrowly tailored to serve a compelling state interest. The Act requires courts prior to trial to detain arrestees charged with certain serious felonies if the government demonstrates by clear and convincing evidence after an adversary hearing that there is no other way to assure the appearance of the person at future proceedings or to protect the safety of the community. The *Salerno* Court emphasized the number of procedural safeguards provided the arrestee, including a "full-blown adversary hearing" in which the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, and the overwhelming nature of the government's interest in protecting the community from danger posed by those who have been arrested for violent and other partic-

ularly serious offenses. *Id.* at 750, 107 S.Ct. at 2103. Again, *Flores* stands in sharp contrast. The children do not pose a threat to the community. There are no comparable procedural protections.

Whatever the proper standard of review, the constitutionality of the INS's regulations must be assessed by evaluating the degree and nature of the harm imposed on the children against the nature of the government interest furthered by the regulations. To the extent the INS seeks to justify the regulation on the ground that they ensure the child's appearance at future hearings, that interest fails to justify the detention of the children. It is not even rational to suppose that the child will be more likely to return for his deportation hearing after being released to an irresponsible relative than if he is released to a responsible adult.⁶

The INS seeks to justify detaining the children primarily on the ground that they do so out of concern for the children's welfare. The INS's assertion that children's welfare is better served by remaining indefinitely in jail stretches credulity. Common sense as well as expert testimony tells us that keeping children in jail, even under "ideal" jail conditions simply is not a rational way for the government to fulfill its responsibilities as "surrogate parent."⁷

⁶ According to appellees, this was an after-the-fact justification put forward by the agency.

⁷ Not surprisingly, experts advise that releasing children to any responsible adult is far preferable to jailing them, even under ideal conditions. See Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition* (1980) (Restraint on the freedom of accused juvenile generally is contrary to public policy. Exceptions recommended only in the case of a juvenile accused of violent crime or

The inadequacy of the INS's justification is underscored by the fact that at the time the agency implemented these regulations out of its concern for the welfare of the children, it was incarcerating them in detention centers commingled with adults without providing them recreation, education, visitation by family or friends, and subjecting them to arbitrary strip searches. It was only as a result of this lawsuit that the agency modified its treatment of the detainees. So although the conditions have been ameliorated by the settlement decree and a court order, the genuineness of the INS concern is placed in some doubt. Certainly at the outset of this litigation, the INS's professed concern for the children's welfare was entirely undercut by the reality of the conditions under which it detained them. Appellees' claim of pretext is not without substance particularly in light of the evidence that undocumented parents who came to claim their children were swooped up immediately and deportation proceedings commenced against them. If the INS were using the children as bait to lure their parents, this would not only be insidious, it would be unconstitutional. "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Plyler v. Doe*, 457 U.S. at 220, 102 S.Ct. at 2396.⁸

with a demonstrated record of flight or who pose a threat to community or himself. "Whenever an accused juvenile cannot be unconditionally released, conditional or supervised release that results in the least restrictive interference with the liberty of the juvenile should be favored over more intrusive alternatives.") *Id.* at §§ 3.4 and 6.6.

⁸ In its amendment at 1003, n. 2, the majority questions my skepticism over the INS's assertion that its policy of detaining children is justified by its pursuit of the children's best interests. The majority

Even assuming that protecting children is a compelling government interest and that Congress has delegated the duty to the INS in this instance, the INS had many options that would be more narrowly tailored and less burdensome. The INS argues that it "is not a social welfare agency" and insists that it does not have the resources or the expertise to assess whether an adult other than a parent or legal guardian would be responsible enough to take custody of a detained minor. However, evaluating the fitness of other adults to take custody of detained minors would appear to be much less burdensome than incarcerating children at a cost of up to \$100 per day and overseeing their welfare in an institutional setting. The administrative burden to the INS in evaluating the fitness of a given adult to take custody of a detained minor would be an insufficient reason to infringe upon children's fundamental constitutional rights. See *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150-52, 100 S.Ct. 1540, 1545-46, 64 L.Ed.2d 107 (1980) (administrative con-

insists that it is rational to believe that indefinite detention of these children serves their welfare more than would releasing them to unrelated adults. The majority opinion raises the spectre of the INS releasing children to child abusers and sexual deviants. However, the INS presented no evidence that this was a risk. Indeed, in a brief filed after this appeal was submitted, amici, including the American Friends Service Committee, Lutheran Immigration and Refugee Service, the American Branch of the International Social Service and other organizations with expertise and experience assisting children and aliens, explained that in their experience it is church members, social workers, and parents with roots in the local community who are willing to take responsibility for the children. I agree that the INS must take precautions to determine that children are released to responsible and suitable adults. The majority accepts the INS's position that although it can afford to keep the children in custody, it does not have the resources to do the screening necessary to ensure their safety on release. I find this position incredible.

venience and savings from imposing blanket eligibility rule rather than making individualized determination of dependency insufficient to justify discriminatory state law.) The INS admits that it never has been sued for having released a juvenile to someone other than a parent or legal guardian, nor is it aware of any case in which a minor released to an unrelated adult has been harmed or neglected. There is simply no evidence that the INS's regulations in fact protect children, are necessary to avoid liability or tend to insure their appearance at future proceedings.

III

In response to appellees' argument that the INS should provide prompt, mandatory, neutral and detached review to every arrested minor, Judge Kelleher issued an injunction ordering the INS to provide all minors taken into custody an administrative hearing to determine probable cause for their arrest and the need to place any restrictions upon their release. The majority concludes that such procedural protections are not constitutionally required in civil deportation hearings. I disagree with this characterization of the issue. What is being challenged is the adequacy of procedures allowing pre-hearing detention following an administrative arrest. Determinations of who may remain in this country invoke entirely different concerns than does the treatment of those persons who are detained awaiting disposition of their immigration status. These INS procedures are more closely analogous to criminal proceedings.

As the Supreme Court repeatedly has instructed, the constitutional sufficiency of procedures must be determined with reference to the rights and interests at stake, and, of course, varies with the circumstances. *Morrissey v.*

Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Supreme Court held that judicial determination of probable cause is a constitutionally required prerequisite to extended restraint of liberty following arrest. Recognizing the injury to an individual's family relationships and job as well as the other restraints on liberty, the Court reasoned that when "the stakes are this high," a determination by a neutral magistrate is required. Prosecutorial judgment standing alone is not enough. *Id.* at 114, 95 S.Ct. at 863. Children held under administrative arrest in detention prior to their deportation hearings require no less. Nonetheless, the majority concludes that *Gerstein* is inapplicable because the arrests at issue in *Gerstein* were pursuant to criminal law while deportation hearings are civil proceedings. The majority instead would remand the case to the district court for application of the *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) test. Although I believe that the outcome under the *Mathews* test will be no different than the conclusion compelled by *Gerstein*, remanding the question to the district court is neither necessary nor appropriate.

In evaluating the constitutionality of procedures provided by the government in any case, *Mathews v. Eldridge* directs courts to consider the interest at stake for the individual, the governmental interests involved, and the value of additional procedural requirements. In essence, these are the factors the Court considered in deciding *Gerstein* the previous year. The Court concluded that an individual's interest in remaining free from incarceration is so great as to require the procedural protection of a neutral and detached magistrate. See also, *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (the liberty interest of a prisoner in not being classified as

mentally ill and transferred to a mental hospital is substantial enough to warrant the procedural safeguard of an independent decisionmaker). Indeed, in *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1983), the Court upheld New York laws governing the pretrial detention of juveniles explicitly in part because the procedural safeguards surpassed those required by *Gerstein*. The *Schall* Court's reliance on *Gerstein* is particularly significant in light of the fact that New York's juvenile detention proceedings are civil; the Court relied on both *Mathews* and *Gerstein* in evaluating the adequacy of procedures applied to determine juvenile detention.⁹

⁹ The majority disregards the Court's application of *Gerstein* to prehearing civil detention because, according to the majority, although the Court cited *Gerstein* numerous times, it "never declared, however, that *Gerstein's* standards directly applied to civil juvenile proceedings." This treatment of the Court's opinion is puzzling. The Court began its discussion of the sufficiency of the procedures afforded juveniles by stating that "In *Gerstein v. Pugh*, 420 U.S., at 114, [95 S.Ct., at 863], we held that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime. . . . *Gerstein* arose under the Fourth Amendment, but the same concern with 'flexibility' and 'informality,' while yet ensuring adequate predetention procedures, is present in this context (citations omitted). In many respect, the FCA provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein*." *Id.* 467 U.S. at 274-75, 104 S.Ct. at 2415. The Court went to on [sic] explicitly compare aspects of the New York law with those features found constitutionally adequate in *Gerstein*.

The majority instead prefers to rely on the "forceful dicta" of *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960). In this 1959 spy case, the Supreme Court rejected a challenge to an arrest that was the product of the INS and the FBI working in concert. It is true that the Court deferred to the "overwhelming historical legislative recognition of the propriety of administrative arrest for deportable

CONCLUSION

We must remember that persons arrested by the INS are often entitled to and do remain in the United States. Some of the children arrested eventually will be found to be citizens or legal aliens, while others may be granted political asylum. Even if we were so unfeeling as to be unconcerned with the tragic effects on children who in the end will be returned to their home countries, at the least we ought to be alarmed at the effect on those who will remain. As the Supreme Court warned in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 " 'the illegal alien of today may well be the legal alien of tomorrow.' " Certainly, incarceration no less than denial of an education, will mean that these children " 'already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class.' " *Id.* at 208-09, 102 S.Ct. at 2390.

I would affirm the district court.

aliens." However, appellees do not challenge whether the INS may make administrative arrests; the issue is what protections must accompany those arrests.

The majority also relies on *Min-Shey Hung v. United States*, 617 F.2d 201 (10th Cir.1980), in which the tenth circuit held the INS procedures for arresting aliens to be sufficient to meet constitutional standards. The *Hung* court, however, did not explain how the INS's law enforcement officers decisions are "basically the same as a criminal proceeding before a magistrate on probable cause." 617 F.2d at 202. In any event, *Hung* did not present an issue of the adequacy of pre-hearing detention; the petitioner was released on bond within 24 hours.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-4544-RJK (Px)

JENNY LISETTE FLORES; ET AL., PLAINTIFFS

v.

EDWIN MEESE, III; ET AL., DEFENDANTS

[Entered May 25, 1988]

JUDGMENT

This matter was heard on each party's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court has considered the declarations, depositions, and other evidence submitted in support of and in opposition to said motions, as well as the

arguments of counsel. The Court has concluded that as to plaintiffs' first and second claims for relief, there is no genuine issue of material fact to be tried and that plaintiffs are entitled to judgment as a matter of law. Accordingly,

IT IS ORDERED that on due process grounds the plaintiffs' motion for summary judgment is granted and that defendants' motion for summary judgment is denied.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendants Attorney General, Immigration and Naturalization Service ("INS"), Harold W. Ezell, and their employees, officers, and agents (collectively referred to as "defendants") shall release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party. Prior to any such release, the defendants may require from such persons a written promise to bring such minor before the appropriate officer or court when requested by the INS.

2. Whenever a minor is released as aforesaid, the minor shall be promptly advised in writing in a language he understands of any restrictions imposed upon his release.

3. Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor.

The Clerk shall send, by United States mail, a copy of this Judgment to counsel for the parties.

DATED: May 24, 1988.

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
Senior Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 85-4544-RJK (Px)

JENNY LISETTE FLORES; ET AL., PLAINTIFFS

vs.

EDWIN MEESE, III; ET AL., DEFENDANTS

[Filed Nov. 30, 1987]

MEMORANDUM OF UNDERSTANDING
RE COMPROMISE OF CLASS ACTION:
CONDITIONS OF DETENTION

1. The parties hereto shall stipulate to an order dismissing without prejudice plaintiffs' Third, Fourth, Fifth, and Sixth Causes of Action, said stipulation, and any order of dismissal entered pursuant thereto, to be conditioned upon implementation of and continuing compliance with the terms of this memorandum of understanding. This memorandum of understanding shall thereupon be an enforceable settlement agreement between the federal defendants and the plaintiff class.

2. Beginning on or before June 1, 1988, except in unusual and extraordinary circumstances as defined herein, the federal defendants shall house all juveniles detained

more than 72 hours following arrest in a facility that meets or exceeds the standards set out in the April 29, 1987, Notice of Funding Programs, 52 Fed.Reg. 15569-15573, attached hereto and incorporated by this reference, and in the document, "Alien Minors Shelter Care Program - Description and Requirements (April 28, 1987)," attached hereto and incorporated by this reference. Such facilities shall additionally provide minors educational and other reading materials in Spanish. The federal defendants shall make reasonable efforts to provide minors reading materials and educational instruction in other languages as needed. The parties agree to negotiate concerning postponement of the June 1, 1988, implementation date in the event of unforeseen circumstances.

3. The INS Regional Associate Commissioner for Operations shall be informed of and monitor instances in which juveniles are not transferred within 72 hours of arrest to a facility meeting the standards described in paragraph 2 above. Such monitoring shall ensure that juveniles are within 72 hours of arrest housed in facilities meeting said standards except in unusual and extraordinary circumstances.

4. "Unusual and extraordinary circumstances" justifying exception to the 72-hour transfer requirement shall be limited to those cases in which the interests of the affected minor would be served by housing the minor in a non-complying facility or in which, because of unforeseen events, the affected minor cannot be housed in a complying facility.

5. For a period of twelve (12) months following dismissal as herein provided, the federal defendants shall report to the court *in camera* all exceptions to the 72-hour transfer requirement, including the name of the affected class member, the date of his or her arrest, the facilities in

which the minor has been housed and dates of occupancy, and the unusual and extraordinary circumstances warranting non-transfer.

6. Plaintiffs shall not refile or otherwise renew the claims alleged in their Third, Fourth, Fifth, and/or Sixth Causes of Action so long as defendants are in compliance with the terms of this memorandum of understanding. Plaintiffs agree to meet with the federal defendants to discuss any alleged non-compliance with the terms of the memorandum prior to refileing or otherwise renewing the claims alleged in their Third, Fourth, Fifth, and/or Sixth Causes of Action.

Approved as to form and content.

Dated: November 24, 1987.

NATIONAL CENTER FOR
IMMIGRANTS' RIGHTS, INC.
Carlos Holguin
Peter A. Schey

NATIONAL CENTER FOR YOUTH
LAW
Alice Bussiere
Teresa Demchak
James Morales

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
John Hagar
Paul Hoffman

/s/ [sig illegible]

Attorneys for Plaintiffs

Dated: November 29, 1987.

ROBERT C. BONNER
United States Attorney

FREDERICK M. BROSI, JR.
Assistant United States Attorney
Chief, Civil Division

GEORGE WU
Assistant United States Attorney

/s/ Ian Fan

IAN FAN
Assistant United States Attorney
Attorneys for Federal Defendants

DEPARTMENT OF JUSTICE

Availability of Funding for Cooperative Agreements; Shelter Care
and Other Related Services to Alien Minors

AGENCY: Community Relations Service (CRS), Justice.

ACTION: Notice of availability of funding for Cooperative Agreements to support programs which provide shelter care and other related child welfare services to alien minors detained in the custody of the United States Department of Justice, Immigration and Naturalization Service.

SUMMARY: This announcement governs the award of Cooperative Agreements to public or private non-profit organizations or agencies and under certain conditions, to for-profit organizations or agencies, to provide shelter care and other related child welfare services to alien minors detained in the custody of the United States Department of Justice, Immigration and Naturalization Service.

Awards will be to one (1) or more organizations. These awards are for the purpose of supporting licensed child welfare programs which provide shelter care and other related child welfare services to male and female alien minors under 18 years of age who are referred to the Community Relations Service by the Immigration and Naturalization Service.

These child welfare services will afford alien minors a structured, safe and productive environment which meets or exceeds respective state guidelines and standards for similar services designed to serve children in their care and custody. Applications submitted pursuant to this announcement must plan for the delivery of services to a

minimum population of 12-15 minors. The ability to provide services to a larger population of children is highly desirable.

The administration of Cooperative Agreements awarded under this announcement will require the substantial involvement of the Federal Government. The level and scope of Federal involvement is delineated in the Community Relations Service document entitled *Alien Minors Shelter Care Program—Description and Requirements*. This document is included in the Proposal Application Package available from the Community Relations Service.

DATE: Closing Date: 5:00 p.m., Eastern Daylight Time, Friday, June 12, 1987.

Proposals will be reviewed, evaluated and competitively rated by an independent panel of experts in the areas of child welfare and social services on the basis of weighted criteria listed in this Notice. All funding decisions are at the discretion of the Director, Community Relations Service. Awards will be subject to the availability of funds and the concurrence of the Assistant Commissioner, Detention and Deportation, Immigration and Naturalization Service.

Authorization

Authorities for the provision of certain child welfare services to alien minors detained in the custody of the Immigration and Naturalization Service (INS) are contained in a Memorandum of Agreement and an Inter-Agency Cost Reimbursable Agreement dated October 1, 1986, and signed by the Acting Director, Community Relations Service; the Assistant Commissioner, Detention and Deportation, Immigration and Naturalization Service and the Director, Refugee Health Affairs, United States Public Health Service.

Legislative authority for the Community Relations Service, Cuban/Haitian Entrant Program is contained in Title V, section 501(c) of Pub. L. 96-422 (The Refugee Education Assistance Act of 1980).

Available Funds

Approximately \$1,500,000 will be available for this program activity on a fiscal year basis. This estimate does not bind the Community Relations Service or the Immigration and Naturalization Service to any specific level of funding. This figure is only intended to serve as an estimate of the total amount of funding which could potentially be available during any specific fiscal year.

Future fiscal year funding for this program is contingent upon need and the availability of Federal appropriations. If adequate funds are available, the Acting Director, Community Relations Service, anticipates continuation of this program.

Awards normally will not exceed a 36 month program performance period. Funding will be for 12-month budget periods.

Eligible Applicants

Non-profit organizations incorporated under state law which have demonstrated child welfare, social service or related experience and are appropriately licensed or can expeditiously meet applicable state licensing requirements for the provision of shelter care, foster care, group care and other related services to dependent children are eligible to apply.

For-profit organizations, incorporated under state law, which have demonstrated child welfare, social service or related experience and are appropriately licensed or can expeditiously meet applicable state licensing requirements

for the provision of shelter care, foster care, group care and other related services to dependent children; and, which can clearly demonstrate that only actual costs, and not profits, fees, or other elements above cost have been budgeted, are also eligible to apply.

The geographical location of the applicant is not restricted to the geographic area of need identified in this Notice; however, the applicant must be able to strongly substantiate that its network of local affiliates or its subcontractor(s) or subrecipients(s) will be able to effectively and appropriately deliver the required services; and, that local service provides organizations are licensed to provide 24 hour care under applicable state laws.

Eligible Client Population

Under the terms of this announcement, the eligible client population will consist of male and female alien minors.

Definition of Alien Minor

For the purposes of this Notice, an alien minor is defined as a male or female foreign national, under 18 years of age, who is detained in the custody of the Immigration and Naturalization Service and is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act; or, has an application for asylum pending with the Immigration and Naturalization Service.

Designated Program Area

The designated program areas consist of:

- SOUTHERN CALIFORNIA (San Diego and Los Angeles Counties)
- TEXAS (Cameron County)

Technical Assistance Conference

The CRS will hold public meetings regarding this solicitation. Further information regarding time, date and location will be included in the Proposal Application Package.

SUPPLEMENTARY INFORMATION

Purpose and Scope

Community Relations Service Cooperative Agreement Recipients (hereafter referred to as Recipient) shall facilitate the provision of temporary shelter care and other child welfare related services to alien minors, who have been approved for transfer to a Community Relations Service supported Shelter Care Program.

These minors, although released to the physical custody of the Recipient, shall remain in the legal custody of the Immigration and Naturalization Service.

The population level of minors is expected to fluctuate as arrivals and case dispositions occur. Program content will, therefore, reflect differential planning of services to minors at various stages of adjustment and administrative processing. In addition, although the population of minors is projected to consist primarily of adolescents, Recipients are expected to be able to serve some children 12 years of age or younger.

Recipients are expected to facilitate the provision of assistance and services for each minor including, but not limited to: physical care and maintenance, access to routine and emergency medical care, comprehensive needs assessment, education, recreation, individual and group counseling, access to religious services and other social services.

Other services that are necessary and appropriate for these minors may be provided if the Community Relations

Service determines in advance that the service is reasonable and necessary for a particular child.

The Recipient will develop an appropriate individualized service plan for the care and maintenance of each minor in accordance with his/her needs as determined in an intake assessment. In addition, agencies or organizations are required to implement and administer a case management system which tracks and monitors client progress on a regular basis to ensure that each child receives the full range of program services in an integrated and comprehensive manner. Shelter care services shall be provided in accordance with applicable state child welfare statutes and generally accepted child welfare standards, practices, principles and procedures.

Service delivery is expected to be accomplished in a manner which is sensitive to culture, native language and the complex needs of these minors.

A. Program Design

The applicant must set forth in detail information concerning the following:

1. Organization/Agency Capability

A comprehensive overview of the applicant agency, agency qualifications and agency history, including agency philosophy, goals and history of experience with respect to the provision of child welfare or related services to children under 18 years of age.

Identification of the organization(s)/agency(ies) proposed for participation in the program, a description of their qualifications in relation to responsibilities; and the mechanism for coordination among these agencies (as applicable).

2. Target Population

A description of the proposed client population including a discussion of program acceptance criteria and estimates of the total number of minors to be served at any one time (capacity) and during any program year.

3. Management Plan

a. A plan which identifies the agency/organization which will have overall fiscal and program responsibility, as applicable.

b. Identifies the organizational structure and lines of authority.

c. Describes the overall proposed staffing plan and staff qualifications for the program.

d. Includes a comprehensive plan for coordination of activities between the various program components and coordination with other community and governmental agencies.

e. Staff supervisory model.

f. Provisions for staff training.

g. Proposed staff schedule(s).

h. Role of consultants and rationale for their use.

4. Individual Client Service Plans

Applicants are expected to describe in detail:

a. The methodology regarding the development of individual client service plans, and;

b. The process to ensure that service plans will be periodically reviewed and updated. Identify staff who will have responsibility for the development and updating of the plans.

5. Case Management

Describe in detail the case management system for tracking and monitoring client progress on a regular basis

to ensure that each minor receives the full range of program services in an integrated and comprehensive manner. Identify the staff positions responsible for coordinating the implementation and maintenance of the case management system.

6. Structure and Accountability

Applicants must fully describe:

a. The plan for developing and maintaining internal structure, control and accountability through programmatic means.

b. Utilization of daily logs, statistical reports, etc.

B. Client Services

Applicants are required to describe in a detailed and comprehensive manner, the following services and the methodology for service delivery:

1. Physical Care and Maintenance;
2. Routine and Emergency Medical/Dental Care;
3. Orientation;
4. Individual Counseling;
5. Group Counseling;
6. Agriculturation/Adaptation;
7. Educational;
8. Recreation, Social and Work Activities;
9. Visitation Procedures;
10. Legal Services, and;
11. Family Reunification Services.

C. Client Records

Applicants must provide descriptive information regarding the development, maintenance and content of individual client case records, including a description of all

material/information which will be maintained in these records.

D. Program Records

Applicants are required to set forth comprehensive information regarding the types of program records to be maintained by the program (daily activity logs, records of staff meetings, cash disbursement systems, daily and weekly status of population reports, etc.).

E. Facility

As applicable, applicants are required to set forth in detail the following:

1. A description of the physical structure and the allocation of space for residential and office use.
2. A description of the location of the facility and discussion of the basis for selection.
3. Proof, in the form of a written certification, that the program and facility meet all applicable zoning and child welfare licensing requirements.

F. Program Evaluation

Applicants must set forth a plan for program evaluation including identification of evaluative criteria.

G. Community Support

Applicants must identify those measures the agency will take or has taken, to assure and maintain community receptivity and support and/or reduce community opposition to the program.

H. Budget

Applicants are required to submit a comprehensive line item budget. A narrative explanation for each line item, included in each object class, must accompany the proposed budget.

I. Supportive Addenda Material

Applicants are required to submit the following supporting material as an addendum to the program proposal;

1. Administrative Requirements
 - A. Agency Administration and Organization
 1. Agency organizational *chart* describing the agency as a whole and the organizational relationship of the proposed program to other agency programs.
 2. Comprehensive organizational *chart* of the proposed program.
 3. Copies of Articles or Incorporation.
 4. Proof of IRS status as a non-profit organization, if applicable.
 5. List of Officers and Board Members, if applicable.
 6. List of professional affiliations and certifications.
 7. Copy(ies) of applicable State child welfare licenses.
 - B. Organizational Standards/Policies and Policies Regarding Clients
 1. Personnel Handbook and Standards of Conduct.
 2. Statement regarding professional and agency liability.
 3. Copy of Disciplinary Procedures.
 4. Copy of Agency policy regarding the confidentiality of client information and records.
 5. Discussion of the method to be used to inform clients of program rules, regulations and policies, including the confidentiality of client information.

6. Copy of Grievance Policy and Procedures.
7. Fire and earthquake evacuation procedures, as applicable.

C. Staff

1. Job/Position Descriptions and resumes (if individuals have been identified for certain positions) for all personnel to be hired for the program including documented evidence of the availability of bi-lingual and/or bi-cultural personnel.

2. Resumes and qualifications of program consultants.

D. Community Support of the Program

1. Letters of program support from local political representatives, social service agencies, etc. Letters should reflect writers' awareness of program's intent, potential Federal funding source and location of the program.

Letters should also contain a recommendation or comment regarding the proposed program.

2. A listing of service providers to whom clients will be referred, including name, address and description of service(s) to be provided.

3. A listing of voluntary and/or donated resources, including letters of intent from the agencies or entities providing the resources, if applicable.

E. Implementation Plan

A plan for program implementation including time-lines regarding significant milestones.

2. Finance

a. A copy of the most recent agency/organization audit.

b. A description of the agency/organization Financial Management System

c. A listing of other Federal, State, local or foundation grants, cooperative agreements or contracts, etc.

being administered by the applicant. This material should include information regarding the funding source(s); grant, cooperative agreements or contract number; level of financial support; purpose of award; grant, cooperative agreement or contract performance period; and name, address and telephone number of grant, cooperative agreement and/or contract officer (Federal, State or local).

d. Subrecipients and/or Subcontractors

1. Identify all proposed services which are to be awarded to subrecipients/subcontractors.

2. Provide relevant background material regarding the proposed subrecipient(s)/subcontractor(s).

3. Provide letters from the proposed subrecipient(s)/subcontractor(s) indicating their commitment and the specific services to be provided.

J. Screening Criteria

CRS will screen all applications submitted pursuant to this Notice. Screening shall be done to determine whether an application is sufficiently complete to warrant consideration and review by the CRS Grant Review Panel. An application may be rejected if:

1. The application is from an ineligible applicant.
2. The application is received after the closing date.
3. The application omits:
 - a. Documented written evidence of community support for the program.
 - b. A comprehensive line-item budget with appropriate descriptive narrative.
 - c. A copy of the latest financial audit of the applicant.

K. Criteria for Evaluating Applications

Applications will be competitively reviewed, evaluated and ranked according to the following weighted criteria:

1. The degree to which the entire proposed plan for developing, implementing and administering a shelter care program is clear, succinct, integrated, efficient, cost effective and likely to achieve program objectives.

2. The quality of the applicant's program management and staffing plans as demonstrated by:

- The adequacy of the plan for program management and the plan for coordination between the components of the program.

- The adequacy of the plan for coordination with community and governmental agencies.

- The adequacy of the qualifications of the applicant organization and the extent to which this organization has a demonstrated record as a provider of child welfare or other social services.

- The extent to which the applicant has a demonstrated capacity for effective fiscal management and accountability.

- The extent to which subrecipient(s)/subcontractor(s) have a demonstrated capacity for effective fiscal and program management and accountability.

- The adequacy of the plans for staff supervision and intra-program communication.

- The adequacy of the staffing plans in terms of the relationship between the proposed functions and responsibilities of the staff in the program, and the education and relevant experience required for the position.

- Clear organizational charts delineating organizational relationships and levels of authority, including the identification of the staff position accountable for the overall management, direction and progress of the program.

3. Program Services—The applicant's response to the required program services, including a description of program resources which demonstrates:

- The capacity of the program to offer comprehensive, integrated and differential services which meet the needs of the clients.

- Utilization of resources in a manner which enhances program control, structure and accountability.

- Provision of services in a manner which promotes and fosters cultural identification and mutual support.

- Sensitivity to the issues of culture, race, ethnicity and native language.

4. The degree to which the applicant provides effective strategies of programmatic control, predictability and accountability as evidenced by the structure and continuity inherent in the program design.

5. The adequacy of the plans for:

(a) Developing and updating individual client service plans, and;

(b) The proposed system of case management.

6. The reasonableness of the proposed budget and budget narrative, in relation to proposed program activities.

7. The degree to which the application has provided written documented evidence of community support and acceptance of the program.

L. Application Request and Submission

Eligible applicants may request a Proposal Application Package from the United States Department of Justice, Community Relations Service, Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815; Attention: Cynthia Bowie, Senior Grants Management Specialist.

Proposal Application Packages may also be obtained by contacting the Community Relations Service at (301) 492-5818 or 1-800-424-9304.

Applicants must submit a signed original and two (2) copies of the proposal and supporting documentation to the United States Department of Justice, Community Relations Service, Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815; Attention: Cynthia Bowie, Senior Grants Management Specialist.

Applications Delivered by Mail

An applicant must show proof of mailing consisting of the following:

1. A legible dated U.S. Postal Service postmark.
2. A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.
3. A date shipping label, invoice or receipt from a commercial carrier.

If an application is sent through the U.S. Postal Service, the Director does not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service.

Applicants should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, the applicant should check with their local Post Office.

Applicants are encouraged to use registered or at least First Class mail. Each late applicant will be notified that the application will not be considered.

Applications postmarked on or before June 12, 1987, shall be considered as timely applications.

Applications Delivered by Hand

An application that is hand-delivered must be taken to the United States Department of Justice, Community

Relations Service, Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815.

The Grants Management Office will accept hand-delivered applications between 9:00 a.m. and 5:00 p.m., Eastern Daylight Time daily, except Saturdays, Sundays and Federal holidays.

An application that is hand-delivered will not be accepted after 5:00 p.m., Eastern Daylight Time, on the closing date.

Catalog of Federal Domestic Assistance
Number: 16.201.

Dated April 24, 1987.

Wallace P. Warfield,

Acting Director, Community Relations Service.

Intergovernmental Review

Application Requirements

Pursuant to Executive Order 12372, *Intergovernmental Review of Federal Programs*, all States have the option of designing procedures for review and comment on Federally assisted programs. Each applicant is required to notify each State in which it is proposing activities under this announcement and to comply with the State's established review procedures. This may be done by contacting the applicable State Single Point of Contact (SPOC).

State Requirements

Comments and recommendations relative to applications submitted under this solicitation should be mailed no later than 45 days after the date of publication, addressed to: Richard Gutierrez, Coordinator, Immigration and Refugee Affairs, Community Relations Service, Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815.

ALIEN MINORS SHELTER CARE PROGRAM – DESCRIPTION AND REQUIREMENTS

United States Department of Justice

Community Relations Service

4/28/87

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I. INTRODUCTION:

The United States Department of Justice (DOJ), Community Relations Service (CRS) and Immigration and Naturalization Service (INS) have entered into an agreement to establish a network of community based shelter care programs to provide physical care and maintenance and other related services to alien minors detained in the custody of the Immigration and Naturalization Service.

The intent of this initiative is to provide a safe and appropriate environment for alien minors for the interim period beginning when the minor is transferred into a CRS Shelter Care Program and ending when a final disposition of the minor's status is implemented. Final disposition may result in either the bond, release or removal of the minor from the United States.

This document will provide operational policy instructions and application guidance to agencies and organizations which are applying for Federal funds to develop plans, programs, and administrative procedures for the care and maintenance of alien minors held in the custody of the INS.

II. BACKGROUND:

The Shelter Care Program described in this document was developed as an inter-agency approach and response to the complex issues associated with the apprehension and detention of alien minors by the Immigration and Naturalization Service.

The United States has traditionally accepted immigrants and refugees from around the world. Ordinarily, persons desiring such status apply for entry while residing in their own country or in a third country known as a "country of first asylum." However, since 1978, alien minors have

been entering the United States seeking refugee or immigrant status without any prior administrative processing. These minors are coming primarily from the Caribbean nations and from Central and South America.

During the past two years, significant numbers of minors have been entering the United States at various border points between the United States and Mexico. The largest concentrations of entries are in the States of Texas and California. These minors come primarily from El Salvador, Nicaragua, Guatemala and Honduras. When apprehended by Federal authorities, these minors are taken to either an INS Contract Facility or Border Patrol Facility. For the most part, these are adult detention facilities which are not appropriate environments for the detention of dependent minors.

Many of these detained minors (primarily males 13 to 17 years of age) are seeking some form of relief from deportation. It is estimated that as many as 5,500 other than Mexican minors were apprehended by Federal authorities during Federal Fiscal Year 1986. A majority of these children are found to be "bound for" parents, other relatives, godparents or friends already residing in the United States and it appears that the majority of these youths were attempting to establish residence in this country.

Since 1980, the CRS and INS have worked together to provide temporary shelter care and other related services to Cuban/Haitian Entrant and other alien minors apprehended and detained by the INS in South Florida. These minors are provided physical care and maintenance and other services while waiting disposition of various INS proceedings. This CRS program has provided services to over 2,500 children apprehended by the INS.

In October 1986, the CRS and INS entered into a comprehensive Inter-Departmental Memorandum of Agreement which provides the framework for a national initiative to address the challenges and complex issues created by this influx of Central American youth.

The CRS and INS intend to work closely with CRS Cooperative Agreement Recipients (hereafter referred to as Recipients) to assist with the development and administration of programs that address the intricate and complex needs of the youth for care and protection in a manner which meets the mandates of current United States law.

III. SCOPE OF WORK:

Recipients shall facilitate the provision of temporary shelter care and other related services to alien minors who have been approved for transfer from detention at various INS Contract Facilities or Border Patrol Facilities. Shelter care services will be provided for the interim period beginning when the minor is transferred into the Shelter Care Program and ending when a final disposition of the child's status is implemented. Final disposition may result in either the bond, release or removal of the minor from the United States.

These minors, although released to the physical custody of the CRS Recipient, shall remain in the legal custody of the INS.

The population level of alien minors is expected to fluctuate as arrivals and case dispositions occur. Program content must, therefore, reflect differential planning of services to children in various stages of personal adjustment and administrative processing. Although the population of minors is projected to consist primarily of adolescents, Recipients are expected to be able to serve some children 12 years of age and younger.

CRS Recipients are expected to facilitate the provision of assistance and services for each alien minor including, but not limited to: physical care and maintenance, access to routine and emergency medical care, comprehensive needs assessment, education, recreation, individual and group counseling, access to religious services and other social services.

Other services that are necessary and appropriate for these minors may be provided if CRS determines in advance that the service is reasonable and necessary for a particular child.

Recipients are expected to develop and implement an appropriate individualized service plan for the care and maintenance of each minor in accordance with his/her needs as determined in an intake assessment. In addition, Recipients are required to implement and administer a case management system which tracks and monitors client progress on a regular basis to ensure that each child receives the full range of program services in an integrated and comprehensive manner.

Shelter care services shall be provided in accordance with applicable State child welfare statutes and generally accepted child welfare standards, practices, principles, and procedures. The CRS intends that services be delivered in an open type of setting without a need for extraordinary security measures. However, Recipients are required to design programs and strategies to discourage runaways and prevent the unauthorized absence of minors in care.

Service delivery is expected to be accomplished in a manner which is sensitive to culture, native language and the complex needs of these children.

IV. AUTHORIZATION:

Authority for the provision of shelter care and related child welfare services to alien minors detained in the custody of the Immigration and Naturalization Service (INS) is contained in a Memorandum of Agreement and an Inter-Agency Cost Reimbursable Agreement, dated October 1, 1986, and signed by the Acting Director, Community Relations Service; by the Assistant Commissioner for Detention and Deportation, Immigration and Naturalization Service and by the Director, Refugee Health Affairs, United States Public Health Service.

Legislative authority for CRS Cuban/Haitian Entrant child welfare activities is contained in Title V, Section 501(c) of Public Law 96-422 (The Refugee Education Assistance Act of 1980).

V. FUNDING INSTRUMENT AND AWARDS:

Awards of Federal monies to support the activities detailed in this document will be in the form of Cooperative Agreements issued by the Community Relations Service. All final funding decisions are at the discretion of the Director, Community Relations Service.

In addition, Awards are subject to the availability of funds and the concurrence of the Assistant Commissioner for Detention and Deportation, Immigration and Naturalization Service.

Awards for shelter care activities normally will not exceed a 36 month program performance period. Funding will be for 12 month budget periods; continuation of funding is dependent upon successful completion of prior year objectives, the level of need as defined by the Federal Government and the availability of future fiscal year funding.

VI. APPLICABLE FEDERAL REGULATIONS AND REGULATORY REQUIREMENTS:

Cooperative Agreements awarded by the Community Relations Service are subject to the following Federal Regulations:

Title 28, Code of Federal Regulations

Part 42, Subpart C Non-discrimination in Federally assisted programs, Title VI of the Civil Rights Act of 1964

Part 42, Subpart D Non-discrimination in Federally assisted programs—implementation of Section 815(c)(1) of the Justice System Improvement Act of 1979

Part 42, Subpart G Non-discrimination based on handicap in Federally assisted programs

Part 42, Subpart H Procedures for complaints of employment discrimination filed against recipients of Federal financial assistance

*Title 41, Code of Federal Regulations**Title 45, Code of Federal Regulations*

Part 46 Protection of Human Subjects

Title 48, Code of Federal Regulations

Part 31.2 Contract Cost Principles and Procedures

VII. ELIGIBLE APPLICANTS:

Non-profit organizations incorporated under State law

which have demonstrated child welfare, social service or related experience and are appropriately licensed or can expeditiously meet applicable state licensing requirements for the provision of shelter care, foster care, group care and related services to dependent children are eligible to apply.

For-profit organizations incorporated under State law which have demonstrated child welfare, social service or related experience and are appropriately licensed or can expeditiously meet state licensing requirements for the provision of shelter care, foster care, group care and other related services to dependent children and which can clearly demonstrate that only actual costs and not profits, fees, or other elements above cost have been budgeted, are also eligible to apply.

The geographical location of the applicant is not restricted to its selected area of service; however, the applicant must be able to strongly substantiate that its network of local affiliates or its subcontractor(s) or subrecipient(s) will be able to effectively and appropriately deliver the required services and that local service provider organizations are licensed under applicable State law to provide emergency shelter care and related services to dependent children.

VIII. DEFINITION OF ALIEN MINOR:

An alien minor is defined as a male or female foreign national under 18 years of age who is detained in the custody of the Immigration and Naturalization Service and is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act, or who has an application for asylum pending with the Immigration and Naturalization Service.

IX. CLIENT POPULATION:

It is anticipated that the client population will generally consist of males, 13-17 years of age. Females generally comprise approximately 15% of the total population of alien minors. These minors are primarily nationals of El Salvador, Nicaragua, Guatemala and Honduras; however, Recipients can expect to provide services to children from other countries. Recipients should also be prepared to provide emergency shelter care to limited numbers of children 12 years of age and younger.

Clients would generally be considered to be dependent children without significant behavioral or psychological problems. Many children have inconsistent or sporadic educational histories and some children may be illiterate in their own language.

X. PROGRAM DESIGN:

Shelter care and related services can be provided through either residential, foster or group care programs. Applicants are not restricted in their individual approaches to service delivery however, the ability to provide a mix of services and deliver these services in geographic proximity to the applicable District INS office is highly desirable due to the varying needs of the client population, the needs of the Federal Government and the varying length of time that the youth will be in care.

Recipients must be able to admit minors on a 24 hour per day, seven (7) day a week basis.

Control, predictability and accountability are essential elements of a successful program. A highly structured, active and productive day of activities mitigates against disruptive behavior.

Program design must insure that the youths follow an integrated and structured daily routine which shall include, but not be limited to: education, recreation, work or chores, study period, counseling, group interaction, free time and access to religious services.

This daily routine will enhance programmatic supervision and accountability as well as encourage the development of individual and social responsibility on the part of each child. Program rules and disciplinary procedures, written and translated into Spanish, must be provided to each client and fully understood by each client and all program staff.

Minors served by this Program are individuals who have entered the United States without inspection. These youths are seeking some type of relief from deportation through an administrative process.

Recipients and their staff are expressly prohibited from hindering or interfering with the execution of final case dispositions as determined by the Federal Government.

The length of care per child is anticipated to be approximately thirty (30) days; however, due to the variables and uncertainties inherent in each case, Recipients must design programs which are able to provide a combination of short term and long term care.

a) *Program Management:*

1. *Organizational Structure and Coordination:*

CRS Recipients are required to have operative plans which identify organizational structures, lines of authority and lines of responsibility. Recipients are also required to maintain and administer comprehensive plans which facili-

tate and enhance intra-program and intra-organizational (if appropriate) communication. At a minimum, programs must ensure weekly staff meetings to discuss client service plans, client progress and client work schedules.

Recipients must maintain linkages with other social service agencies, and the local District Office of the INS. The Program Director for each Recipient shall be responsible for maintaining working relationships and liaison with community organizations and the INS.

2. *Staffing:*

Programs must ensure:

- One (1) person identifiably responsible for the entire program and its outcomes;
- One (1) staff person identifiably responsible for the overall coordination of services including the case management system;
- Clear lines of authority and responsibility;
- Adequate professional staff available to provide program services;
- Adequate levels of staff available to provide structure and to coordinate and deliver all services required of the program;
- Availability of relief staff for illness and holidays;
- Availability of 24 hour per day, seven (7) days per week professional emergency backup staff;
- Employee educational and/or experience levels commensurate with the responsibilities and expertise required of the staff position;
- Staff training, and;

- Adequate levels of individual leave, sick and compensatory time.

All staff members who deal directly with clients must be culturally sensitive and bilingual in English and Spanish.

3. *Direct Program Services:*

All program planning should reflect innovative methods of service delivery. All services shall be delivered in accordance with applicable State licensing requirements and standards.

The following is a description of program services which all Recipients are required to provide:

a) *Care and Maintenance:*

Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, personal grooming items and personal allowance or remuneration for work (outside of normal chores or responsibilities) as defined by applicable State statutes.

b) *Routine and Emergency Medical/Dental Care:*

Access to appropriate routine medical and dental care, family planning services and emergency health care services are a required part of the program. Such services may be provided through enrollment in local medical assistance programs, coverage by health insurance plans or special arrangements with local providers.

Recipients are required to ensure that each child receives a complete medical examination (including screening for infectious disease) within 24 hours of admission, excluding weekends and holidays.

A written immunization policy and procedure which is in compliance with the U.S. Public Health Service, Center for Disease Control, should be implemented. Policy and procedure will be provided by INS.

If hospitalization is required, the Recipient is required to make the proper arrangements for admittance.

Recipients must develop and administer a comprehensive policy regarding the dispensing of medication and special diets.

Shelter care programs are required to have operative intervention plans in instances of mental health decompensation.

c) *Orientation:*

Upon admission, all clients must receive a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations and legal assistance (INS Form I-770 shall be completed).

d) *Individual Counseling:*

Programs should schedule at least one (1) individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing client progress, establishing new short term objectives and addressing both the developmental and crisis related needs of each minor. Recipient

ipients should anticipate many "emergency" individual counseling sessions.

e) *Group Counseling:*

Programs must conduct group counseling sessions at least twice a week. This is usually an informal process and takes place with all the minors present. It is a time when new minors are given the opportunity to get acquainted with the staff, other children and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational activities, etc. It is a time for staff and minors to discuss whatever is on their minds and to resolve problems.

f) *Acculturation/Adaptation:*

Recipients are required to provide a program which includes, but is not limited to, information regarding personal health and hygiene, human sexuality and the development of social and inter-personal skills which contribute to those abilities necessary to live independently and responsibly.

g) *Education:*

Recipients shall provide an education program in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education.

Services are to be provided by a teacher certified by the State Department of Education. The teacher shall assess each client in order to determine individual educational competency levels. This assessment may determine the need for bilingual classes. Students are usually separated into groups according to their educational competency level rather than by chronological age.

h) *Recreational and Leisure-Time:*

A recreation and leisure-time plan shall include at least one hour per day of large muscle activity and one hour of structured leisure-time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days school is not in session. The recreation program shall be organized and supervised by a trained staff member.

A variety of fixed and movable equipment will be provided for each recreation area. Examples of the variety of equipment that should be available include a basketball, volleyball, softball, tetherball, punching bag and soccer ball.

i) *Work/Employment:*

Written procedures regarding work assignment schedules shall be developed. Consideration will be given to the fact that juvenile aliens are not required to participate in uncompensated work assignments unless the work is housekeeping of personal areas or personal hygiene needs.

4. *Supplemental Services:*

a) *Visitation:*

Visitation and contact with family members shall be encouraged. Visitation at the facility or office shall occur on a day and time to be determined by the Recipient. Such visitation shall be supervised by staff and conducted in such a manner as to ensure reasonable procedures to prevent the unauthorized release of any minor in care.

All visitation plans and procedures require the prior approval of the designated CRS Program Officer.

b) *Legal Services:*

The INS provides all detained minors with specific information regarding the availability of free legal assistance and advises each minor of their right to be represented by an attorney, right to a deportation or exclusion hearing, right to apply for political asylum or right to request voluntary departure.

CRS Recipients are required to restate this information to each minor upon admission to the program. Recipients shall establish procedures to assist each minor in making confidential contact with attorneys or their authorized representatives.

Federal regulations prohibits the expenditure of any CRS Cooperative Agreement funds for the direct provision of legal services or assistance to any child in care.

c) *Family Reunification:*

Upon entering a CRS supported program, each minor shall be interviewed by an identified staff person with an educational background in the behavioral sciences, in an attempt to identify relatives for potential family reunification. Once relative information is obtained, staff is required to make telephone contact with the relative, verify the relationship and develop the following information:

- 1) *Identifying Data*—General information about all members of the household.
- 2) *Personality Description*—Description of relative's personality characteristics and their willingness to share information.
- 3) *Quality of Marriage*—Description of marriage, if applicable.
- 4) *Housing and Financial Situation*—Description of home, neighborhood, expenses, employment, income, etc.
- 5) *Plans for Minor*—Plans the relatives have for the minor (i.e., school enrollment).
- 6) *Personal References*—Two personal references from friends, relatives or other person(s) not living with the relative which can provide additional information, verify the information given by the relative and attest to the relative's commitment and ability to care for the child.
- 7) *Summary and Impressions*—Summary of overall impressions and recommendations.

The information and accompanying recommendation shall be given to the INS Office with responsibility for the minor's case. A copy of these materials shall be forwarded to the designated CRS Program Officer.

ALL FINAL DECISIONS REGARDING THE RELEASE OF MINORS TO RELATIVES WILL BE MADE BY OFFICIALS OF THE INS.

In some cases, it may be necessary for the family to obtain legal guardianship prior to release by the INS. In these cases, Recipients should assist relatives in filing the proper documentation under applicable State statutory requirements.

5. *Assessment:*

CRS Recipients are required to complete a comprehensive assessment of each child within ten (10) working days from the date of admission. The assessment includes:

1. An intake study which must:
 - (a) Set forth the essential data relating to the identification and history of the child and family;
 - (b) Summarize the specific events surrounding the minor's entry into the United States, and;
 - (c) State the specific problem(s) which appear to require immediate intervention.
2. Educational assessment and plan.
3. Assessment of family relationships and interaction with adults, peers and authority figures.

4. A definition of religious preference and practice.
5. Assessment of personal goals, strengths and weaknesses.
6. Assessment of the impact of migration on the youth's future adjustment.
7. Identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States.

6. *Case Management:*

Recipients must ensure that comprehensive and realistic individual client service plans are developed, implemented and closely coordinated for each child through an operative case management system. Individual plans for the care of each minor must be developed in accordance with his/her needs as determined by the various assessments. Staff members responsible for specific case management activities must be identified and their responsibilities fully defined.

Due to the need for consistency and frequent updating of service plans, programs must also ensure that formalized lines of intra-program communication are established as an adjunct to informal channels of staff interaction.

7. *Client Case Records:*

Recipients are required to develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which preserves the confidentiality of client information and protects the records from unauthorized use or disclosure.

At a minimum, client case records must include the following information:

- 1) Name and alien control number;
- 2) Initial screening and intake forms;
- 3) Case information from the referral source;
- 4) Comprehensive assessment;
- 5) Medical/Dental files;
- 6) Medical consent form;
- 7) Individual service plans and case notes;
- 8) Progress reports;
- 9) Program rules/disciplinary policies;
- 10) Copies of disciplinary actions;
- 11) Referrals to other service agencies;
- 12) Cash transaction documentation;
- 13) Inventory of personal effects, and;
- 14) Any other relevant information.

8. *Program Evaluation:*

CRS Recipients must have operative program evaluation plans which include evaluative criteria.

9. *Community Support:*

Applicants are required to identify measures they will take or have taken to assure and maintain community receptivity and support and/or reduce community opposition to the program.

The CRS works closely with the INS in the development, implementation and administration of Shelter Care Programs, and relies upon the INS for various types of operational support. Recipients are also required to maintain ongoing operational relationships with applicable offices of the INS. The CRS will facilitate the development of such operational relationships.

In addition, it is essential that Program Directors develop and maintain liaison with other important community based public and private organizations and agencies.

XI. *SUPPLEMENTAL PROGRAM INFORMATION*

A) *Legal Guardianship:*

All alien minors transferred to CRS supported Shelter Care Programs shall remain in the legal custody of the INS.

B) *Categories of Minors in Federal Detention:*

Specific categories of Alien Minors detained in the custody of the INS are generally as follows:

1. Minors with no locatable parents in either the United States or the country of origin. Such children could be eligible for release or bonding to relatives, licensed child welfare agencies, or voluntary agencies willing to accept custody of these minors.
2. Minors whose parents are locatable in the country of origin and who are in a position to reassume custody of the child. Potentially, these children could be removed from the United States through either exclusion or deportation proceedings or could leave the United States through voluntary departure.
3. Minors with locatable parents residing in the United States. Two situations are in evidence:
 - a) If the parent(s) is documented, the child would be released to the parent's custody;

- b) If the parent(s) is undocumented, the child would be released to the parent's custody after the parents were processed by INS and subsequently assigned to a deportation docket.

INS policy is to release the child with the parents. However, it is possible that a parent could be detained if he/she were found to be the subject of an outstanding criminal warrant.

XII. REPORTING REQUIREMENTS:

A) Program Reporting:

1. Quarterly Program Progress Report:

Recipients shall, within thirty (30) days following the end of each calendar quarter, provide the Designated CRS Program Officer with a Quarterly Program Progress Report.

This report must include, but is not limited to, narrative information describing:

- a) Program progress, movement toward attaining program goals, program achievements and program problems.
- b) Programmatic or budgetary implementation time-lines for the next quarter.
- c) Anticipated budgetary or programmatic modifications which will be requested during the next quarter.
- d) A listing containing the names, positions and dates of action relating to all staff who were hired, laid off, fired, promoted, or who resigned during the reporting period.

- e) Any child abuse or neglect incidents handled under State law.
- f) Listing of all incidents which occurred during the quarter.

2. Final Program Progress Report:

A Final Program Progress Report is due ninety (90) days after the completion of the program performance period.

3. Daily Reports:

Recipients are required to maintain:

- a) A chronological listing of all clients which includes name, alien control number, date of admission and date of discharge.
- b) A Daily Entry Log which accounts for the whereabouts of each minor and documents any significant incidents which occurred during the period.

Copies of the above referenced information shall be included as an addenda to the Quarterly Program Progress Report.

4. Status or Condition Report:

CRS Recipients are required to immediately notify the applicable local District Office of the INS and the Designated CRS Program Officer of any change in the status or condition of any minor in care including the following:

- a) Any unauthorized absence of the minor;
- b) Pregnancy of the minor;
- c) Child-birth by the minor;

- d) Hospitalization of, or serious illness of, or injury to the minor;
- e) Death of the minor;
- f) Arrest and/or incarceration of the minor, and;
- g) Any abuse or neglect incident handled under State law.

B) *Financial Reporting:*

In order to obtain financial information concerning the use of Federal funds, the CRS requires that Recipients of these funds submit timely reports for review. These reports are consistent with the manner of reporting established by OMB Circular A-110.

1. *Schedule of Cooperative Agreement Payment Requests:*

Recipients are required to provide the Grants Management Branch, CRS, with current time-lines reflecting the Recipient's anticipated draw-down of Federal funds.

This schedule of time-lines is due within thirty (30) days of the Recipient's acknowledging receipt of the award.

2. *Financial Reporting – (SF 269):*

Recipients shall, within thirty (30) days following the end of each calendar quarter, furnish to the Grants Management Branch, CRS, an original and two (2) copies of the Financial Status Report, SF-269. This report is required of all CRS Recipients. It is designed to reflect financial information relating to Federal and non-Federal obligations and outlays.

Within ninety (90) days of the end date of the project performance and budget periods, Recipi-

ents must submit to the Grants Management Branch, CRS an original and two (2) copies of the Final Financial Status Report, SF-269.

3. *Financial Reporting – (SF-270):*

This report is applicable to all Recipients who are funded on a "Check-Issued" basis. It is required to document the status of Federal cash when a recipient requests an advance or reimbursement of funds. This report is reviewed on a quarterly basis for Recipients receiving reimbursement of funds and on a monthly basis for those organizations receiving advance funding.

4. *Federal Cash Transaction Report – (SF-272):*

Recipients shall, within fifteen (15) working days following the end of each quarter, furnish the Grants Management Branch, CRS with an original and two (2) copies of the Federal Cash Transaction Report, SF-272. It is designed to provide cash and disbursement information.

XIII. *RECORD RETENTION AND DISPOSITION OF DATA:*

CRS Recipients are required to maintain all records, program and financial information and/or data for three (3) years following the date of submission of a Final Program Progress Report.

At the conclusion of the three (3) year retention period, CRS will instruct Recipients regarding destruction or delivery of all records, program and financial information and/or other data.

Recipients are required to provide any and all records, program and financial information, and/or data requested by CRS. This information is to be delivered to: -

UNITED STATES DEPARTMENT OF JUSTICE
COMMUNITY RELATIONS SERVICE
CUBAN-HAITIAN ENTRANT PROGRAM
SUITE 330
5550 FRIENDSHIP BOULEVARD
CHEVY CHASE, MD 20815

XIV. PROGRAM APPLICATION ADDENDA MATERIAL:

Shelter Care Program Applicants are required to attach the following addenda material to their technical program proposals. FAILURE TO COMPLY WITH THESE REQUIREMENTS COULD BE GROUNDS FOR NONACCEPTANCE OF PROPOSALS.

A) Administrative Requirements:

1. Agency Administration and Organization:

- a) Agency organizational *chart* describing the agency as a whole and the organization relationship of the proposed program to other agency programs.
- b) Comprehensive organizational *chart* of the proposed program.
- c) Copies of Articles of Incorporation.
- d) Proof of IRS status as a non-profit organization, if applicable.
- e) List of Officers and Board Members, if applicable.
- f) List of professional affiliations and certifications.
- g) Copy(ies) of applicable State child welfare licenses.

2. Organizational Standards/Policies and Policies Regarding Clients:

- a) Personnel Handbook and Standards of Conduct.
- b) Statement regarding professional and agency liability.
- c) Copy of Disciplinary Procedures.
- d) Copy of agency policy regarding the confidentiality of client information and records.
- e) Discussion of the method to be used to inform clients of program rules, regulations and policies, including the confidentiality of client information.
- f) Copy of Grievance Policy and Procedures.
- g) Fire and earthquake evacuation procedures, as applicable.

3. Staff:

- a) Job/Position Descriptions and resumes (if individuals have been identified for certain positions) for all personnel to be hired for the program, including documented evidence of the availability of bi-lingual and/or bi-cultural personnel.
- b) Resumes and qualifications of program consultants.

4. Community Support of the Program:

- a) Letters of program support from local political representatives, social service agencies, etc. Letters should reflect writers'

awareness of program's intent, potential Federal funding source and location of program.

Letters should also contain a recommendation or comment regarding the proposed program.

- b) A listing of service providers to whom clients will be referred, including name, address and description of service(s) to be provided.
- c) A listing of voluntary and/or donated resources, including letters of intent from the agencies or entities providing the resources, if applicable.

5. *Implementation Plan:*

A plan for program implementation including time-lines regarding significant milestones.

B) *FINANCE:*

- 1. A copy of the most recent agency/organization audit.
- 2. A description of the agency/organization Financial Management System.
- 3. An itemization of all other Federal, State, local or foundation grants, cooperative agreements or contracts, etc., being administered by the applicant. This listing should identify the funding source; grant, cooperative agreement or contract number; level of financial support; purpose of award; grant, cooperative agreement or contract performance period; and name, address and telephone number of grant, cooperative agreement and/or contracts officer (Federal, State or local).

4. *Subrecipients and/or Subcontractors:*

- a) Identify all proposed services which are to be procured through subrecipients/subcontractors.
- b) Provide relevant background material regarding the proposed subrecipient(s)/subcontractor(s).
- c) Provide letters from the proposed subrecipient(s)/subcontractor(s) indicating their commitment and the specific services to be provided.

C) *BUDGET:*

The proposed budget will be examined by the CRS Senior Grants Management Specialist to verify the costs data, evaluate specific elements of cost and determine if costs are necessary, reasonable and allowable under applicable Federal statutes and regulations. The following budget structure should be used to provide appropriate costs breakdowns.

Detailed costs justification (Budget Narrative) for each budget category *MUST BE* attached to the budget.

1. *Personnel:*

Show salaries and wages only. Fees and expenses for consultants should be included in another category entitled "other". The name and title, salary amounts and level of effort (allocation of time) must be identified for each position.

2. *Fringe Benefits:*

Submit a current copy of the negotiated fringe benefit rate. If fringe benefits are applicable to

direct salaries and wages and treated as a part of the negotiated Indirect Cost Rate (IDC), provide detailed information in the budget narrative.

3. *Travel:*

Use only for travel (domestic) of employees on the Cooperative Agreement. Include estimated cost breakout for airfare, per diem (\$100 per day plus an additional \$25.00 per day for incidental expenses during the travel period—i.e., taxi, etc.), number of days, number of persons traveling for the purpose of attending a CRS sponsored conference.

Travel costs for consultants should not be identified in this category, nor should costs associated with local transportation (i.e., where no out-of-town trip is involved).

4. *Equipment:*

Use only for non-expendable personal property, which is defined as follows:

Non-expendable personal property is tangible personal property having a useful life of more than two (2) years and an acquisition cost of \$500 or more per unit. An applicant may use its own definition of non-expendable personal property provided that such definition would at least include all tangible personal property. Personal property is property of any kind except real property.

Each item of non-expendable personal property must be identified and explained (i.e., office equipment and furnishings which are usable for activities other than the technical, specialized

aspects of the grant program). Indicate whether property will be purchased or leased.

5. *Supplies:*

Include all tangible expendable personal property except that which is included in the equipment line. Requests in excess of \$500 per category of tangible expendable personal property (supplies) must be identified and explained.

6. *Contractual:*

Use for procurement contracts (except those which belong on other line items such as equipment, supplies, and construction). Payments to individuals such as stipends, consulting fees, and benefits must not be included in this category.

7. *Renovation:*

Costs for alterations and renovation must be explained in detail.

8. *Client Costs:*

All costs directly related to clients such as stipends and allowances, essentials, food, personal items, clothing, local transportation, out of pocket medical services, etc., must be identified and explained.

9. *Other:*

a) All direct costs not clearly covered in categories listed above (i.e., consulting costs, local transportation, office and facility rental, van usage, fringe benefits included as a part of the IDC rate, etc.) must be identified and explained.

- b) Requests for any item which requires prior approval by the CRS Grants Officer must be identified and explained.
- c) Costs for space rental should be identified by square feet. Also identify utilities and break out costs per month.

10. *Indirect Costs:*

Identify and explain indirect cost items.

XV. SUPPLEMENTAL INFORMATION—OFFICE AND RESIDENTIAL FACILITIES:

The following information is intended to provide general guidelines and information regarding office spaces and residential facilities.

1. *Office Space:*

Depending on the program, appropriate office space may be:

- a. Rented at the residential site (as a separate cost item);
- b. Rented from the primary applicant of which the program is a part;
- c. Provided free of cost, or;
- d. Included in the rental of the residential facility.

In all cases except foster care services, it is essential that office space be co-located with a residential facility in order to facilitate oversight, control and staff coverage.

2. *Residential Facilities:*

Residential space requirements must be based upon the number of clients served and the types of services delivered on site.

a) CRS Recipients are required to set forth in detail the following:

- 1. A description of the physical structure and the allocation of space for residential and office use.
- 2. A description of the location of the facility and a discussion regarding the basis for selection.
- 3. A description of security measures which will discourage runaways and prevent the unauthorized release of a minor from the program.

b) In addition, applicants must include information supporting the following requirements:

- 1. All residential facilities and office space must conform to applicable zoning and special use permit requirements.
- 2. All facilities must conform to applicable building, fire, health and safety codes and/or ordinances.
- 3. All facilities must meet applicable state child welfare licensing requirements.
- 4. All programs must have established fire and, as applicable, earthquake,

evacuation procedures. All clients and staff must be familiar with these procedures.

5. All residential space (including foster homes) and office space must be equipped with smoke detectors and fire extinguishers.

Renovation of Facility:

In cases when renovation is required to bring a facility into compliance with existing codes and regulations, the extent and reasonableness of renovation costs depend upon the extent of repairs required, property value, etc. Repair work and renovation requires documented estimates of cost and time and a description of the repair. Programs must conform to the procurement standards set forth in Office of Management and Budget (OMB) Circular A-122.

All repairs and renovations require the prior approval of the CRS.

Maintenance of Facility:

Programs should include a monthly budgeted amount for maintenance and general repairs to the facility. This may include funds for commercial refuse disposal contracts. The lease or rental agreement should clearly define the extent of leasee and lessor responsibilities as they pertain to maintenance and repairs.

Leases:

Programs must be flexible in lease arrangements in order to accommodate an uncertain client flow from Federal detention. Leases should include options for renewal beyond the anticipated end date of the lease agreement.

All leases are subject to the prior approval of CRS Program and Grants Management staff.

Insurance:

All program facilities must have adequate levels of fire, theft and liability insurance.

Utilities:

Programs should budget for this expense on a monthly basis if not included in the monthly rent. If office space is shared with another program or agency, utilities are to be pro-rated according to the percent of usage as it relates to square feet. Utilities include heat, water, electricity and natural gas.

XVI. SUPPLEMENTAL INFORMATION—EQUIPMENT, FURNISHINGS AND SUPPLIES:

The following information is intended to be illustrative of equipment, furnishings and supplies which are considered to be reasonable and necessary in the operation of a shelter care program.

CRS Recipients are required to obtain the following through the most cost-effective means available.

1. *Equipment:*

The following is seen as reasonable for the furnishing of office space.

Office Furnishings:

- a. Desks
- b. Chairs
- c. Tables
- d. File Cabinets
- e. Typewriters or Word Processing System
- f. Copy Machine

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- g. Book Cases/Shelves
- h. Lamps
- i. Tapes and Cassette Player
- j. Telephones
- k. Paging System

The determination should be made whether it is more cost effective to lease or buy a particular piece of equipment or obtain it through the General Services Administration. In addition, items that can be used free of charge by a program should be identified.

2. *Residential Furnishings:*

The program should provide the following furnishing for their residential operation.

- a. Tables
- b. Chairs
- c. Desks (study space)
- d. Books and Shelves
- e. Bulletin Board
- f. Television Set
- g. Stereo or Radio
- h. Couch
- i. File Cabinet
- j. Maintenance tools
- k. Appliances/Kitchen Implements
- l. Recreational Equipment

3. *Administrative and Facility Supplies:*

Included are:

- a. General Office Supplies such as pens, pencils, paper etc.
- b. Household and Maintenance Supplies
- c. Copier Supplies

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- d. Educational Material and Supplies
- e. Vehicle Maintenance Supplies
- f. Postage Stamps
- g. Forms

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. § 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2), any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

2. § 1357. Powers of immigration officers and employees

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant —

* * * * *

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

3. § 242.2 Apprehension, custody, and detention.

(a) *Detainers in general.* (1) Only an immigration officer as defined in section 101(a)(18) of the Act, or § 103.1(q) of this chapter is authorized to issue a detainer. Detainers may be issued only in the case of an alien who is amenable to exclusion or deportation proceedings under any provision of law.

(2) *Availability of records.* In order for the Service to accurately determine the propriety of issuing a detainer, serving an order to show cause, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Service of a conviction or act which renders an alien excludable or

deportable under any provision of law shall provide the Service with all documentary records and information available from the agency which reasonably relates to the alien's status in the United States, or which may have an impact on conditions of release.

(3) *Telephonic detainers.* Issuance of a detainer in accordance with this section may be authorized telephonically, *provided* such authorizations are confirmed in writing on Form I-247, or by electronic communications transfer media (e.g. the National Law Enforcement Telecommunications System (NLETS)) within twenty-four hours of the telephonic authorization. The contents of the electronic transfer shall contain substantially the same language as the Form I-247.

(4) *Temporary detention at Service request.* Upon a determination by the Service to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed forty-eight hours, in order to permit assumption of custody by the Service.

(5) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter shall incur any fiscal obligation on the part of the Service, until actual assumption of custody by the Service, except as provided in paragraph (a)(4) of this section.

(b) *Use of convictions.* The term *conviction* as used in section 242(i) of the Act means that —

(1) There has been a conviction by a court of competent jurisdiction; and

(2) All direct appeal rights have been exhausted or waived; or

(3) The appeal period has lapsed.

(c) *Warrant of arrest.* (1) At the time of issuance of the Order to Show Cause, or at any time thereafter and up to

the time the respondent becomes the subject of a duly issued warrant of deportation, the respondent may be arrested and taken into custody under the authority of a warrant of arrest, provided that, in the case of a respondent convicted on or after November 18, 1988, of an aggravated felony as defined in section 101(a)(43) of the Act, the respondent shall not be released from custody unless a determination is made by the District Director that the respondent's departure cannot be effected, or until respondent becomes subject to supervision under the authority contained in section 242(d) of the Act. However, such warrant may be issued by no other than a:

- (i) District director;
- (ii) Acting district director;
- (iii) Deputy district director;
- (iv) Assistant district director for investigations;
- (v) Deputy assistant district director for investigations;
- (vi) Assistant district director for deportation;
- (vii) Deputy assistant district director for deportation;
- (viii) Assistant district director for examinations;
- (ix) Deputy assistant district director for examinations;
- (x) Assistant district director for anti-smuggling;
- (xi) Officer in charge (except foreign);
- (xii) Chief patrol agent;
- (xiii) Deputy chief patrol agent;
- (xiv) Associate chief patrol agent;
- (xv) Assistant chief patrol agent; or
- (xvi) The Assistant Commissioner, Investigations.

(2) If, after the issuance of a warrant of arrest, a determination is made not to serve it, any officer authorized to

issue such warrant may authorize its cancellation. When a warrant of arrest is served under this part, the respondent shall have explained to him/her the contents of the order to show cause, the reason for the arrest and the right to be represented by counsel of his/her own choice at no expense to the Government. He/she shall also be advised of the availability of free legal services programs qualified under part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where the deportation hearing will be held. The respondent shall be furnished with a list of such programs, and a copy of Form I-618, Written Notice of Appeal Rights. Service of these documents shall be noted on Form I-213. The respondent shall be advised that any statement made may be used against him/her. He/she shall also be informed whether custody is to be continued or, if release from custody has been authorized, of the amount and conditions of the bond or the conditions of release. Except in cases involving an alien convicted on or after November 18, 1988, of an aggravated felony as defined in section 101(a)(43) of the Act, a respondent on whom a warrant of arrest has been served may apply to any officer authorized by this section to issue such a warrant for release or for amelioration of the conditions under which he/she may be released. When serving the warrant of arrest and when determining any application pertaining thereto, the authorized officer shall furnish the respondent with a notice of decision, which may be on Form I-286, indicating whether custody will be continued or terminated, specifying any conditions under which release is permitted, and advising the respondent appropriately whether he/she may apply to an immigration judge pursuant to paragraph (d) of this section for release or modification of the conditions of release or whether he/she may appeal to the Board. A direct appeal to the

Board from a determination by an officer authorized by this section to issue warrants shall not be allowed except as authorized by paragraph (d) of this section.

(d) *Authority of Immigration Judge; Appeals.* After an initial determination pursuant to paragraph (c) of this section, and at any time before a deportation order becomes administratively final, upon application by the respondent for release from custody or for amelioration of the conditions under which he or she may be released, an Immigration Judge may exercise the authority contained in section 242 of the Act to continue to detain a respondent in, or release from custody, and to determine whether a respondent shall be released under bond, and the amount thereof, if any. Application for the exercise of such authority must be made in the following order: First, if the alien is detained, the Immigration Judge Office at or nearest the place of detention; second, the Immigration Judge Office having administrative control over the case; third, the Office of the Chief Immigration Judge for designation of an appropriate Office of the Immigration Judge. However, if the respondent has been released from custody, such application must be made within seven (7) days after the date of such release. Thereafter, application by a released respondent for modification of the terms release may be made only to the District Director. In connection with such application the Immigration Judge shall advise the respondent of his right to representation by counsel of his or her choice at no expense to the government. He or she shall also be advised of the availability of free legal services programs qualified under part 292(a) of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where his or her application is to be heard. The Immigration Judge shall ascertain that the respondent has received a list of such programs, and the receipt by the respondent of a

copy of Form I-618, Written Notice of Appeal Rights. Upon rendering a decision on an application under this section, the Immigration Judge (or District Director if he renders the decision) shall advise the alien of his or her appeal rights under this section. The determination of the Immigration Judge in respect to custody status or bond redetermination shall be entered on the appropriate EOIR form at the time such decision is made, and the parties shall be promptly informed orally or in writing as the reasons for the Judge's decision. Consideration under this paragraph by the Immigration Judge of an application or request of a alien regarding custody or bond shall be separate and apart from any deportation hearing or proceeding under this part, and shall form no part of such hearing or proceeding. The determination of the Immigration Judge as to custody status or bond may be based upon any information which is available to the Immigration Judge or which is presented to him by the alien or the Service. The alien and the Service may appeal to the Board of Immigration Appeals from any such determination. If the determination is appealed, a written memorandum shall be prepared by the Immigration Judge giving reasons for the decision. After a deportation order becomes administratively final, or if recourse to the Immigration Judge is no longer available because of the expiration of the seven-day period aforementioned, the respondent may appeal directly to the Board from a determination by the District Director, Acting District Director, Deputy District Director, Assistant District Director for Investigations, or Officer in Charge of an office enumerated in § 242.1(a), except that no appeal shall be allowed when the Service notifies the alien that it is ready to execute the order of deportation and takes him into custody for that purpose. An appeal to the Board shall be taken from a determination by an Immigration Judge pursuant to § 3.36 of this

chapter. An appeal to the Board taken from an appealable determination by the District Director, Acting District Director, Deputy District Director, Assistant District Director for Investigations, or Officer in Charge of an office enumerated in § 242.1(a), shall be perfected by filing a notice of appeal with the District Director within 10 days after the date when written notification of the determination is served upon the respondent and the Service. Upon the filing of a notice of appeal from a District Director's determination, the District Director shall immediately transmit to the Board all records and information pertaining to that determination. The filing of an appeal from a determination of an Immigration Judge or a District Director shall not operate to delay compliance, during the pendency of the appeal, with the custody directive from which appeal is taken, or to stay the administrative proceedings or deportation.

(e) *Revocation.* When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in § 242.1(a), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and cancelled. The provisions of paragraph (d) of this section shall govern availability to the respondent of recourse to other administrative authority for release from custody.

(f) *Supervision.* Until an alien against whom a final order of deportation has been outstanding for more than six months is deported, he shall be subject to supervision by a district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in

§ 242.1(a), and required to comply with the provisions of section 242(d) of the Act relating to his availability for deportation.

(g) *Privilege of communication.* Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality in the United States. Existing treaties require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in exclusion or expulsion proceedings, whether or not requested by the alien, and, in fact, even if the alien requests that no communication be undertaken in his behalf:

Algeria³
 Argentina³
 Australia³
 Austria³
 Belgium³
 Bolivia³
 Brazil³
 Cameroon³
 Canada³
 Chile³
 China, People's Rep. of⁶
 China, Rep. of
 Colombia³
 Costa Rica
 Cuba³
 Czechoslovakia³
 Cyprus
 Denmark³
 Dominican Republic³
 Ecuador³
 Egypt³

See footnotes at end of table.

El Salvador³
 Fiji³
 France³
 Gabon³
 Gambia
 Germany, Fed Rep.³
 Ghana
 Guatemala³
 Guyana³
 Holy See³
 Honduras³
 Hungarian People's Rep.³
 Iraq³
 Ireland¹
 Italy³
 Jamaica
 Jordan³
 Kenya
 Kuwait
 Laos³
 Lesotho³
 Liechtenstein³
 Luxembourg³
 Madagascar³
 Malawi
 Malaysia
 Mali³
 Malta
 Mauritius³
 Mexico³
 Nepal³
 New Zealand³
 Niger³

See footnotes at end of table.

Nigeria
 Oman³
 Pakistan³
 Panama³
 Paraguay³
 Philippines
 Poland²
 Portugal³
 Romania⁴
 Rwanda³ —
 Senegal³
 Sierra Leone
 Singapore
 Somalia³
 Spain³
 Sweden³
 Switzerland³
 Tanzania
 Tonga³
 Trinidad & Tobago
 Tunisia³
 Uganda
 United Kingdom
 England
 Northern Ireland
 Scotland
 Southern Rhodesia
 Wales
 Union of Soviet Socialist Rep. (USSR)
 Uruguay³
 Upper Volta³
 Venezuela³

See footnotes at end of table.

Viet-Nam, Rep.³
 Yugoslavia³
 Zambia

4. § 242.24 Detention and release of juveniles.

(a) *Juveniles.* A juvenile is defined as an alien under the age of eighteen (18) years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others.

In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.

¹ Unless national requests that such information not be transmitted.

² If national is an alien admitted to lawful permanent residence, communication will be made with Polish consulate only upon the request of such national.

³ If national requests his government be notified. INS must notify *immediately*.

⁴ Notification must be made within two days.

⁵ Notification must be made within three days.

⁶ Notification must be made within four days.

(2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

(c) *Juvenile Coordinator.* The case of a juvenile for whom detention is determined to be necessary should be referred to the *Juvenile Coordinator*, whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility designated for the occupancy of juveniles. These may include juvenile facilities contracted by the INS, state or local juvenile facilities, or other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.

(d) *Detention.* In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement

for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by INS authorities or placed in any INS detention facility having separate accommodations for juveniles.

(e) *Refusal of release.* If a parent of a juvenile detained by the INS can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his/her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and shall be afforded an opportunity to present their views to the district director, chief patrol agent or immigration judge before a custody determination is made.

(f) *Notice to parent of application for relief.* If a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from deportation, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director or immigration judge before a determination is made as to the merits of the request for relief.

(g) *Voluntary departure.* Each juvenile apprehended in the immediate vicinity of the border who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form, that he or she may make a telephone call to a parent, close relative, a friend, or to an organization found on the free legal services list. Each other juvenile apprehended shall be provided access to a telephone and must in fact communicate

with either a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If the juvenile, of his or her own volition, asks to contact a consular officer, and does in fact make such contact the requirements of this section are satisfied.

(h) *Notice and Request for Disposition.* When a juvenile alien is apprehended, he or she must be given a Notice and Request for Disposition. If the juvenile is under fourteen years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language the juvenile understands. In the event a juvenile who has requested a hearing pursuant to the Notice subsequently decides to accept voluntary departure, a new Notice and Request for Disposition shall be given to, and signed by the juvenile.

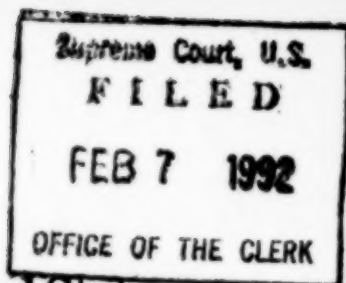
5. § 287.3 Disposition of cases of aliens arrested without warrant.

An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Immigration and Nationality Act shall be examined as therein provided by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him/her, may examine the alien. If such examining officer is satisfied that there is prima facie evidence establishing that the arrested alien was entering or attempting to enter the United States in violation of the immigration laws, he/she shall refer the case to an immigration judge for further inquiry in accordance with parts 235 and 236 of this chapter or take whatever other action may be appropriate or required under the laws or regulations applicable to the

particular case. If the examining officer is satisfied that there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws, further action in the case shall be taken as provided in part 242 of this chapter. After the examining officer has determined that formal proceedings under sections 236, 237, or 242 of the Act, will be instituted, an alien arrested without warrant of arrest shall be advised of the reason for his/her arrest and the right to be represented by counsel of his/her choice, at no expense to the government. The alien shall also be provided with a list of the available free legal services programs qualified under part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter which are located in the district where the deportation hearing will be held. It shall be noted on Form I-213 that such a list was provided to the alien. The alien shall also be advised that any statement made may be used against him/her in a subsequent proceeding and that a decision will be made within 24 hours as to whether he/she will be continued in custody or released on bond or recognizance. Unless voluntary departure has been granted pursuant to § 242.5 of this chapter, the alien's case shall be presented promptly, and in any event within 24 hours, for a determination as to whether there is prima facie evidence that the arrested alien is in the United States in violation of law and for issuance of an order to show case and warrant of arrest as prescribed in part 242 of this chapter.

(4)

No. 91-905



In the Supreme Court of the United States

OCTOBER TERM, 1991

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v.

JENNY LISETTE FLORES, et al.,

**OPPOSITION TO PETITION FOR
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SUMMARY OF OPPOSITION

A

The issue here is narrow. Involved is the Immigration and Naturalization Service's (INS) practice on the detention and release of children, a practice the agency has significantly modified since filing its petition for a writ of certiorari. Respondent children do not challenge the Immigration and Nationality Act, INS regulations as written, or any other exercise of plenary power over immigration. Neither the holding nor the rationale of the court below will allow a greater number persons into this country or otherwise affect the INS's authority to determine the circumstances under which persons are admitted, excluded, or deported.

At issue here is an INS practice that imposes automatic, non-individualized, and indefinite detention upon children when reasonable alternatives for release to responsible adult or licensed child welfare programs are available. This challenge is based squarely on an uncontroverted record showing INS practices to be unconscionable *as they have been applied* toward children. The INS's petition ignores the record showing that the agency's routine detention of children *in fact* does nothing to protect them or further any other legitimate governmental purpose.

The INS sharply departs from accepted child welfare standards in seeking to "protect" children by jailing them. The agency's blanket approach to juvenile detention prompted the Child Welfare League of America, Defense for Children International, U.S. Catholic Conference, Lutheran Immigration and Refugee Services, and Global Ministries of the United Methodist Church, among many others, to file briefs

amici curiae decrying the agency's wholesale incarceration of children.

As these amici point out, sound child welfare practices emphasize that routinely incarcerating children, even under ideal conditions, is inimical to their welfare— and conditions in INS jails are anything but ideal.

Again the petition misstates and goes outside the record in trying to portray INS detention camps as good places for children. The evidence establishes that the INS houses children for prolonged periods in facilities failing to meet minimal standards for decency and humanitarian care. Conditions in INS detention facilities are particularly harmful to children's physical and emotional well-being.

B

The holding and rationale of the lower court are unarguably narrow. The en banc court of appeals reasonably applied settled principles of due process to an unusual and extraordinarily compelling set of facts. Not surprisingly, the INS points to *no* conflict between the court of appeals' opinion and the opinion of any other court of appeals.

The practical effect of the decision below is similarly circumscribed. This is the *first and only* case in which the INS has sought to detain anyone on grounds having nothing to do with the goal of the Immigration and Nationality Act: regulating the admission, exclusion and deportation of aliens. The INS's *sole* justification for automatic detention here — protecting children — is unprecedented both from the standpoint of immigration law and from the standpoint of modern child welfare practices. The court of appeal's decision, being limited to this peculiar justification for detention, in no way impairs the agency's ability to carry out its statutory mission.

C

Even were the analysis of the court of appeals somehow in error, its *result* is certainly in accord with the decisions of this Court. Respondent children have consistently urged that the detention practice at issue here exceeds the INS's authority under the Immigration and Nationality Act ("INA") because it imposes *automatic* detention, not detention pursuant to any actual exercise of discretion. This Court recently held that the INS must *exercise* discretion to detain in an individual case, *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, __ U.S. __, 112 S.Ct. 551 (1991), yet the INS here argues it is entitled to pursue a policy of blanket detention for minors. The Court need not and should not review yet another case involving INS detention authority when the agency expressly seeks to exercise that authority inconsistently with *National Center*.

D

On December 13, 1991, after filing its petition in this case, the INS unilaterally altered its policy on releasing detained minors. *For the first time* the INS now appears willing to release minors to "a responsible adult designated by the parent or legal guardian in a sworn affidavit," or to "a licensed child-care facility including a foster home, group home, temporary boarding home, or facility for the housing of neglected, abused, or emotionally disturbed children." Respondents' Appendix.

The courts below, of course, have never had a chance to consider INS policy as it is now being applied, and granting certiorari on the issues the INS raises would, on the one hand, be unfair to the judges of the courts below. On the other, because the lower

courts have yet to take evidence on how the INS's current policy is being applied, any decision of this Court would amount to no more than an advisory opinion on a practice the INS purports to have abandoned.

STATEMENT OF THE CASE

I Factual and procedural background

Pursuant to 8 U.S.C. § 1252(a), INS agents arrest minors whom they suspect may be deportable aliens.¹ Such children are arrested pursuant to civil deportation statutes and are rarely accused of any crime.

Generally, the INS releases persons on bond pending the outcome of deportation proceedings. If an individual is not so released, he or she remains incarcerated until proceedings to determine deportability are completed, a process that may take years. 2 Clerk's Record 10 ("CR").

INS practice until September of 1984 was to release children to parents or other responsible adults who could care for the children and give reasonable assurances that the children would appear for depor-

¹ Persons are taken into custody upon probable cause they are (1) aliens and (2) deportable from the United States. This preliminary determination, often made by INS officers in an atmosphere of "confusion and pandemonium," United States Commission of Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* 90-91 (1980), provides at most preliminary assurance that a person is either an alien or deportable. Correctly, a person is deportable only if determined to be so in a due process hearing at which the INS bears the burden of proving both alienage and deportability by "clear, unequivocal and convincing" evidence. *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 286 (1966).

tation proceedings. 88 CR 72; 163 CR 1191; 162 CR 915; 163 CR 1201, 1207, 1213.

While in other parts of the country the INS continued to release children to responsible custodians regardless of blood relationship, in September 1984 INS Regional Commissioner Harold Ezell prescribed a different policy for minors arrested in the INS's Western Region:

No minor shall be released except to a parent or lawful guardian. This is necessary to assure that the minor's welfare and safety is [sic] maintained and that the agency is protected against possible legal liability.

District Directors and Chief Patrol Agents are authorized, in unusual and extraordinary cases, to release a minor to a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child. Release shall not be permitted if any doubt exists that the child will be properly protected.

3 CR 41.

The result Ezell's directive could not have been more dramatic: children who normally would have been restored to freedom within a day or two were *automatically committed for up to a year in INS detention camps*. 160 CR 400.

On July 11, 1985, 15-year-old Jenny Flores, 16-year-old Dominga Hernandez, 13-year-old Alma Cruz, and 16-year-old Ana Martinez, filed this suit. 1 CR 4-5.² On May 16, 1988, the children moved for summary judgment requiring the INS to release them unless

² On July 19, 1985, Jenny and Dominga, still in jail under the new regional policy, asked Senior District Judge Robert J. Kelleher to order their release. 5 CR. Judge Kelleher ordered the INS to free them to responsible custodians the INS had rejected. 10 CR.

there was some reason to believe that release to an available custodian would be contrary to a particular child's best interests. The INS urged the court to defer ruling until it published new regulations covering the release of minors, and Judge Kelleher agreed. CR 252.

The new regulations, however, retained the INS's wholesale approach to jailing children. The regulations did not so much as permit minors' release to licensed juvenile shelters or long-time family friends. Indeed, the only apparent change the new regulations made was to add grandparents to the list of close relatives to whom minors were already being released.³ There remained no alternative to indefinite confinement for orphans, children whose relatives are in foreign countries, or children whose relatives refused to appear for them.⁴

Some three years after the case had first come before it, the district court issued a simple order in the children's favor. 256 CR. The facts compelling the district court's action remain uncontroverted.

II Scores of children denied any chance to regain freedom.

The INS represents that its regulation imbues local officials with discretion to release minors to custodi-

³ Because INS regulations had for years required that children held for *exclusion* hearings be released to certain adult relatives in addition to parents and guardians, Judge Kelleher had earlier ordered the agency to release children held for *deportation* hearings to those same relatives. 188 CR. The new INS regulation applied to children held for either deportation or exclusion proceedings.

⁴ Two of the four class representatives, including one girl freed by Judge Kelleher, would still have remained jailed under the "new" regulations.

ans not appearing on the agency's short list. In practice, however, INS field officers testified that they *never* released children to anyone except close adult relatives. *E.g.*, 161 CR 870-71. The "unusual and compelling" exception in fact provided children no meaningful chance to regain their freedom.

For boys and girls without an immediate relative to come for them, the INS's regulation meant jail unless and until a guardian could be appointed, a process of many weeks.⁵ In reality, few children in INS detention ever had any real chance of obtaining a guardian: apart from being physically confined, such children are typically unfamiliar with legal procedures and unable to afford a lawyer. Obtaining a guardian proved a false hope for ending indefinite detention.

III The dearth of due process following administrative arrest.

The INS readily confesses to *automatically* jailing children until and unless an immediate relative comes for them. The agency argues that its scheme is saved by the availability of a bond "redetermination" hearing before an immigration judge, but this is a hearing it will provide *only* "upon

⁵ Although California law provides for expedited appointment of "temporary" guardians, the Los Angeles Superior Court declared children in INS detention ineligible for temporary guardians. 163 CR 1138-39. Denied temporary guardians, children were obliged to remain in INS jails until a permanent guardian could be appointed—a minimum of four to six weeks. *Id.* at 1163.

application" of the child. 8 C.F.R. § 242(b) (emphasis added).⁶

Though the INS thinks a child is "adequately protected by his right to seek a hearing before an immigration judge," Petition at 23, Judge Rymer points out that in reality

there is no process there. While procedures provided by the executive in immigration matters are rarely held inadequate, *some* process is due. Nothing in this regulation triggers any determination at any particular time of whether an alien juvenile who is presumptively eligible for release, but has no family, may be released to the custody of an unrelated adult who will agree to her care and appearance. Nor is there any light at the end of the tunnel; there is no time limit on continued detention, despite the child's eligibility for release. For all that appears from the regulations, the juvenile without parent, guardian or relative is left in procedural limbo.

App. 48a-49a (Rymer, J., concurring in part and dissenting in part) (emphasis in original; citations omitted).

Detention, it seems, is the beginning and the end of the INS's purported interest in acting *parens patriae*. In all other matters, the INS is content to leave a child on his or her own to invoke and proceed through its complex administrative procedures.

⁶ Nothing in the INS's regulations requires an immigration judge to decide youngsters' custody motions within any specific time.

IV The uncontroverted proof that INS detention of children furthers no legitimate governmental purpose.

To read the petition, the INS houses minors in "special child-care facilities," Petition at 2, that are particularly salutary for children suffering post-traumatic stress disorder. *Id.* at 7 n.9.⁷ Juvenile justice expert Paul Demuro, who visited several of the INS's facilities, describes things differently:

The El Centro facility is a converted migrant farm workers' barracks which has been secured through the use of fences and barbed wire ... At [the San Diego] facility each barracks is secured through the use of fences,

⁷ The INS supports this portrayal not by reference to any record evidence, but by citing a partial settlement agreement in which the agency pledged to improve conditions in western jails in which it holds minors. There is no evidence that conditions have actually improved. To the contrary, nine non-profit organizations that work with immigrant and refugee children presented voluminous evidence of public record to the court of appeals showing that conditions in INS camps are harmful to children. Brief *Amicus Curiae* of Immigrant, Refugee and Civil Rights Groups, March 1, 1991. These amici cite, *inter alia*, a recent state report on conditions affecting juveniles in INS detention:

A recent case of a twelve year old undocumented youth taken into immigration court in handcuffs and shackles reignited public interest in INS treatment of youth.... INS has no standards for children in detention and according to the children's own testimony, use of handcuffs is not uncommon in addition to arbitrary punishment, inadequate food, lack of access to counsel or phones. One youth who was subsequently sent to Juvenile Hall described the vast improvement over INS detention conditions.

California Legislature, Joint Committee on Refugee Resettlement, International Migration and Cooperative Development, *Joint Interim Hearing on Impact of INS Policies and Reforms* (July 19, 1990).

barbed wire, automatic locks, observation areas, etc. In addition the entire residential complex is secured through the use of a high security fence (16-18'), barbed wire, and supervised by uniformed guards

No facility had recreational or educational areas, equipment or materials meeting accepted standards for juvenile detention. In all four facilities, young children ate their meals with unrelated adults. The major activity at each facility is TV watching and lining up to make collect telephone calls.

163 CR 1277.

Though the INS admits it detains children for their own "protection" and for no other purpose, 76 CR 45-46, the uncontroverted evidence shows that children are endangered, not protected, by open-ended terms in INS jails.

- *Children in INS detention routinely share sleeping quarters, bathrooms, and other common areas with unrelated adult prisoners of both sexes.*

At the ECI facility at El Centro, California, young unaccompanied boys mixed with adult women. 159 CR 351. Children and adults shared the same unpartitioned showers. Adult women and children shared the same toilets, which also lacked partitions. *Id.* at 353. There were no physical barriers between the male and female sleeping areas at the INS detention facilities at Hollywood, California, 77 CR 686, or Inglewood, California. 160 CR 356-57.⁸ Similar practices prevailed at other facilities. 160 CR 271.

⁸ On at least one occasion, a boy was sexually abused by a female adult while in an INS contract facility in Laredo, Texas. A top INS official dismissed the incident as perhaps having been "consensual." 159 CR at 145-46.

- *Minors in INS detention have been routinely strip searched without the slightest cause.*

In Laredo, Texas, jailers strip searched children simply because they had visited with their attorneys, 78 CR 1153-54, purportedly to stop the lawyers' soliciting clients. 76 CR 395. Standard search procedures were also typically lacking. At the INS's staging facility near San Diego, California, teenage girls were required to undress completely; teenage boys were permitted to leave their underwear on. 163 CR 1281.⁹

- *Children in INS jails are routinely denied the right to visit with their families and friends.*

Children incarcerated at the Casa San Juan facility in San Diego, California, were barred from ever seeing their family members. 163 CR 1070. At the Staging Area in San Diego, the INS simply never told children that they could receive visitors. 160 CR 311. Not surprisingly, children's visits were "far and few between." *Id.* at 311. Any visits that did occur were abruptly terminated after 15 minutes. *Id.* at 312-13.

- *The INS conceded that incarcerated children receive few or no educational services or reading materials.*

The vast majority of children in INS detention received no educational instruction at all because, as a top INS official put it, "It is not [an INS] function. It would be costly." 76 CR 403 (emphasis added). The agency admitted that seven of the twelve facilities in which minors were most often held provided youngsters no instruction whatsoever. Those facilities ac-

⁹ In 1988, the district court enjoined the INS's arbitrary strip search practices. *See Flores v. Meese*, 681 F.Supp. 665 (C.D. Cal. 1988).

counted for over 64 percent of all detained juveniles. 78 CR 1159.

- *Children in INS jails have little or no recreation.*

As one INS jailer testified, children in his facility could only "play in the dirt" or go out in the desert summer "and let their tongue[s] hang out in the heat." 159 CR 201. Recreational opportunities were similarly lacking at other facilities throughout the country. *E.g.*, 160 CR 314-15.

The uncontroverted record thus shows the INS is at best marginally qualified to care for children during months of open-ended confinement. Caring for children in an institutional setting is quite clearly "not an INS function." In contrast to its deplorable record as a child-care provider, however, the INS has proved quite competent at releasing children to responsible, if unrelated, adults.

- *For years the INS released minors to non-relatives, yet there has never been any case in which a minor released to such a custodian suffered harm or neglect.*

Until now the INS proved willing and able to place children with responsible, if unrelated, custodians. *See, e.g.*, 163 CR 1209 (Baltimore district policy to release juveniles to "parent, family member or a responsible adult"); 162 CR 915 (San Francisco district policy to release minors to "a responsible adult"). In over six years of litigation, the INS produced *no* evidence that this policy resulted in any minor actually being harmed or neglected. Nor has the INS ever

been sued for negligently releasing a minor to an unrelated adult. 76 CR 27; 159 CR 26.¹⁰

In fine, the INS admitted having *no* evidence that juveniles released to parents or legal guardians are *in fact* less likely to be harmed or neglected than if released to other adults or child welfare organizations. 76 CR 65, 260-91. The agency admitted that it merely "*presume[d]* that harm or neglect will be less likely if a minor is in the custody of a person such as a parent or legal guardian ..." 78 CR 1239 (emphasis supplied).

Ironically, the Assistant Supervising Probate Attorney for the Los Angeles County Superior Court described the court's procedure for screening adults seeking appointment as guardians as involving only a brief personal interview and a sworn petition setting out the proposed guardian's qualifications,¹¹ 163 CR at 1159-60, a process remarkably similar to that the INS for years had successfully employed.

- *Juvenile justice standards are unanimous that releasing children to available responsible adults, whether relatives or not, is far preferable to jailing them.*

The INS's years of successfully placing children with responsible, if unrelated, custodians, confirms a basic tenet of child welfare: arbitrary restrictions on children's release are contrary to sound child welfare practices.

¹⁰ If anything, the INS risks greater liability by incarcerating children. Four INS officers are currently being sued for beating and psychologically abusing minors during two separate incidents in 1991. *Garcia v. United States*, No. CV 91-0908-GT (S.D. Cal.).

¹¹ As discussed, however, the superior court refuses to appoint temporary guardians for minors in INS detention.

All recognized juvenile justice standards declare that releasing children to reputable adults, whether relatives or not, is far preferable to jailing them. 171 CR 553.¹² Congress, too, joins this consensus, mandating that federal magistrates release minors to reputable adults regardless of blood relationship:

If the juvenile has not been discharged before his initial appearance before the magistrate, the magistrate shall release the juvenile to his parents, guardian, custodian, or other responsible party (including, but not limited to, the director of a shelter-care facility) ... unless the magistrate determines ... that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.

18 U.S.C. § 5034 (emphasis supplied).

So wide of the mark is the INS's approach to detaining children that the Child Welfare League of America, Defense for Children International, the U.S. Catholic Conference, Lutheran Immigration and Refugee Services, and Global Ministries of the United Methodist Church, among many others, were compelled to file briefs *amicus curiae* in support the respondent children. As these respected child welfare advocates point out, experience has shown

¹² E.g., U.S. Department of Health Education and Welfare, *Model Acts for Family Courts and State-Local Children's Programs* (1974); National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* (1982); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973); Institute of Judicial Administration/American Bar Association, *Standards Relating to Noncriminal Misbehavior* (1982), and *Standards Relating to Interim Status* (1982); National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act* (1968).

the devastating effect of detention on the psychological and physical health of these children. [C]onfinement in an institutional setting such as an INS detention facility can impair children's physical and emotional development; diminish their sense of self-worth; place them at risk of physical harm by other detainees; and deprive them of contact with family and other sources of psychological and social support. ... *The INS's policy is not only inhumane to these children but also detrimental to society. The psychological damage to these children caused by their detention will bring about long-term detrimental effects to our society, since some of these children, after completing the deportation hearing process, will remain legally in this country.*

Brief of *Amici Curiae* United States Catholic Conference, et al., on Behalf of Plaintiffs-Appellees on Rehearing En Banc, at 10-11 (emphasis supplied).

In sum, the uncontroverted record shows the INS's detention practice to be wholly at odds with the agency's nominal purpose: protecting children. Examined in light of the evidence, the INS's practice simply makes no sense.

V The relief granted.

Upon these facts the district court ordered two things: first, that the INS release minors to reputable adults *unless there is reason not to*;¹³ second, in those

¹³ The district court's order requires the INS to release "any minor otherwise eligible for release to his parents, guardian, custodian, conservator, or other responsible adult party." 256 CR 2 (emphasis supplied). The agency need not release if it has any actual reason to believe that an available adult is not

instances where the INS denies release, that the agency should have its decision independently reviewed.

As Judge Rymer points out, the district court's order is wholly procedural. App. 44a. *Nothing bars the agency from exercising discretion to deny release to persons deemed unable to care for a child.* The agency must only determine that a given child will benefit from detention if it wishes to jail that child indefinitely. The district court's order thus provides no more than unobtrusive *procedural* protection for children's basic liberty.

REASONS FOR DENYING THE WRIT

I The holding and rationale of the opinion below are sound, narrow, and have no significant impact on the administration of the immigration laws.

The heart of the INS's complaint is that the court of appeals showed too little deference to its detention practices. Petition at 15. The agency argues that it enjoys plenary power to regulate immigration and that this power extends to its detaining children whom it alleges, but has never proved, are deportable aliens. The INS therefore concludes that the courts below erred in requiring that it actually exercise discretion before committing a child to indefinite incarceration. Absent the gloss of "plenary authority," however, the court of appeal's opinion is no more than an unremarkable application of settled princi-

"responsible." The order, moreover, requires release only to *some* responsible party: *e.g.*, a licensed community shelter, foster care program, group home, church group, or other reputable individual. Nothing bars the INS from *preferring* one placement over another.

ples of due process to an unusual and extraordinarily compelling set of facts.

The errors in the INS's plenary authority argument are at least two. First, this is not a case involving whom to admit or exclude from the United States, an area over which the political branches are properly said to exercise plenary authority. Neither the holding nor the rationale of the court of appeals will allow a greater number of persons into this country, or otherwise effect the INS's ability to determine the circumstances under which persons are admitted, excluded, or deported. *Compare Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977) (substantive immigration enactments reviewed only for facial legitimacy), *with I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983) (method implementing substantive immigration enactment subject to searching review), *and Landon v. Plasencia*, 459 U.S. 21, 32-37 (1982) (same).

Second, any authority the INS properly claims is by definition subordinate to that of Congress, and Congress, in accord with accepted child welfare practices, is pledged to minimizing the detention of minors. 18 U.S.C. § 5034. The order below requires only that the INS be similarly circumspect. In short, it is not respondent children who quarrel with Congress's immigration power, it is the INS that seeks to thwart Congress's efforts to minimize the incarceration of children.

Once the veil of "plenary authority" is pierced, the court of appeal's opinion is unremarkable. True, the court did characterize children's interest in freedom from bodily restraint as "fundamental," but this Court did no less in *United States v. Salerno*, 481 U.S. 739, 749 (1987).

The INS counters that *Salerno* involved procedural, not substantive, due process. Respondents disagree. *See Id.* at 749-50 (balancing individual's "strong in-

terest" in bodily liberty against "needs of society"). In any event, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court expressly held that the Constitution affords *substantive* protection against physical restraint that survives even civil commitment. 457 U.S. at 315. In determining whether this right has been violated, the Court held, courts must "weigh[] the individual's interest in liberty against the State's asserted reasons for restraining individual liberty. ..." 457 U.S. at 320-321.

The court of appeals searched the record in vain for some proof that the INS's blanket approach to jailing children in fact serves a "significant" governmental purpose whatsoever. App. 19a. As has been seen, the INS failed to produce *any* evidence that automatic restrictions on children's freedom serve any governmental purpose. Indeed, the uncontroverted evidence shows the INS's policy contrary to its sole nominal purpose: protecting children. On the other side of the equation, children's fundamental interest in freedom from institutional restraint must "freely be conceded." *Salerno*, 481 U.S. at 749.

Even were the court of appeals' analysis flawed, the practical impact of its decision is so minimal that certiorari would simply not be worth granting. This is the *first and only* case in which the INS has sought to detain anyone on grounds unrelated to its statutory mission. Until now, the agency has used its detention and bail powers solely to ensure availability for deportation, to protect national security, or to further some other purpose underlying Congress's immigration policy. See, e.g., *Carlson v. Landon*, 342 U.S. 524 (1952) (national security); *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, ___ U.S. ___, 112 S.Ct. 551 (1991) (protecting U.S. workers from displacement by foreign labor).

The INS counters that it is now unable to avoid "the obvious risks" releasing children to unrelated adults entails. Petition at 25. Again, the INS overstates its case.

To begin with, nothing in the district court's order prevents the INS from detaining a child it reasonably determines would be protected by detention. The order requires only in the most general terms that the agency refrain from jailing children without actual cause. How this modest protection against the needless incarceration of children is to be carried out is entirely up to the INS.

Further, the risks the INS complains it is unable to avoid are anything but obvious where, *in the more than three years since the district court's order, the agency has identified no child abused or neglected because of being released pursuant to that order.*

Of course, the agency is always free to seek relief from judgment if ever a single child were harmed or neglected, or if changed circumstances were otherwise to render the district court's order "detrimental to the public interest." *Rufo v. Inmates of Suffolk County Jail*, ___ U.S. ___, 112 S.Ct. 748 (1992) (emphasizing need for flexibility under Rule 60(b), Fed.R.Civ.Proc., to modify a decree whenever the circumstances, whether of law or fact, have changed or new ones have arisen). Clearly, the INS is anything but powerless to protect children from actual harm.

The INS's remaining complaint is that providing neutral review of children's custody status represents "a serious diversion of resources from INS's responsibilities to administer and enforce the

immigration laws." Petition at 25.¹⁴ Without offering any evidence, the agency represents that it holds "almost three" custody hearings a day for children arrested in the Western Region. *Id.* Actually, the burden of providing children with custody hearings is far less than the petition would lead the Court to believe.

The INS began holding custody hearings for minors on June 13, 1988. Plaintiffs/Appellees' Supplemental Brief on Rehearing En Banc, Appendix 3.¹⁵ From that time until September 26, 1989, custody hearings were held for only 416 minors nationwide— *less than one hearing per day*. *Id.*, Appendix 1 at ¶¶ 4 and 9. Forty-five percent of these were held as part of a bond redetermination, which under its own regulations the agency has to provide regardless. *Id.* at ¶ 9. Many of the remaining custody hearings are held jointly with deportation proceedings, which the INA obliges the agency to provide regardless. Appendix 3 at 2.

As the court of appeal points out, "The only new requirements ... are that, if the alien is a child, such a hearing must be held regardless of whether the alien

¹⁴ So, too, is spending up to \$100 per day of taxpayers' money to keep a child in INS detention facilities. 159 CR 76. Remarkably, the agency concedes having made no effort to determine whether it would be more cost-effective to screen adults seeking the release of detained children rather than continuing to detain children at public expense. 79 CR 1669-70.

¹⁵ The referenced documents were disclosed pursuant to the Freedom of Information Act by the Executive Office of Immigration Review, an entity within the United States Department of Justice. Appendix 4. Their accuracy can be readily verified from the agency's official records, a source "whose accuracy cannot reasonably be questioned." Accordingly, they should be judicially noticed. *Cf.*, *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (Court judicially notices fishing license).

requests it, and the determination at the hearing must include an inquiry into whether any non-relative who offers to take custody represents a danger to the child's well being." App. 25a. The INS could not possibly be burdened by providing children such minimal procedural consideration. In sum, neither the rationale nor the holding of the en banc court of appeals is of sufficient import to warrant this Court's granting the INS's petition.

II The INS's blanket approach to juvenile detention exceeds its authority under the Immigration and Nationality Act as recently construed by this Court.

As the Court's recent decision in *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, __ U.S. __, 112 S.Ct. 551 (1991), makes clear, the Immigration and Nationality Act compels a result identical to that of the court of appeals. The Court should decline to review yet another case involving INS detention when the position the agency now advances is squarely at odds with *National Center*.

In *National Center*, the INS argued that it has authority to condition a deportable alien's release on bond on his or her refraining from unauthorized employment. The court of appeals assumed that the INS did not provide an individualized determination of whether a particular alien lacked authorization to work. Before this Court, however, the Solicitor General advised that the INS does make "an initial, informal determination [as to] whether the alien holds some status that makes work 'authorized.'" 112 S.Ct. at 588-89. Only upon this representation did the Court approve the INS's regulation:

We agree that the lawful exercise of the Attorney General's discretion to impose a no-

work condition under § 212(a) requires some level of individualized determination. Indeed *in the absence of such judgments, the legitimate exercise of discretion is impossible in this context.* ...

Taken together [the INS's] administrative procedures are designed to ensure that aliens detained and bonds issued under the contested regulation will receive the individualized determinations mandated by the Act in this context.

112 S.Ct. at 588-89 (emphasis supplied).

The INS's position here is expressly inconsistent with *National Center*. The INS now argues that it is entitled to *automatically* detain *all* children until and unless an immediate adult relative appears to request custody:

In response to comments suggesting that release to responsible adults should be permitted on a regular basis, *the INS stated that it did not have the resources or expertise necessary to make a determination, in each case, whether release to the adult in question would be in the child's best interests.* 53 Fed. Reg. at 17,449.

App. 7a (emphasis added); accord Petition at 23 n.21 ("government is entitled, as a general matter, to enact a rule of law forbidding release to unrelated adults..."; "existence of particularized harm ... irrelevant..."); and n.22 ("court of appeals erred in ... [concluding] that an individualized hearing is required in each case").¹⁶

¹⁶ Unlike *National Center*, this is not a facial challenge to a regulation enjoined on the eve of its promulgation, but, as discussed above, a challenge based on an uncontroverted record showing that INS field officers *never* release children to anyone except a parent or immediate relative.

Respondent children have consistently argued that INS detention practices exceed the agency's statutory authority because they result in *automatic* detention without any actual exercise of discretion. App. 80a. The Court need not and should not grant certiorari in yet another case involving INS detention practices when its recent decision makes clear that the agency's blanket approach to detaining children is unlawful.

III Certiorari is inappropriate where the INS has implemented policy changes not passed on by the courts below.

The INS's petition is at best unfair to the courts below: after filing its petition the agency modified its juvenile release policy, and the actual controversy before this Court appears markedly different from that presented to the district court and the court of appeals.

On December 13, 1991, the INS issued a national memorandum that purports to modify its juvenile detention and release policy. Respondent's Appendix. The memorandum directs INS field officers to release minors to "a responsible adult designated by the parent or legal guardian in a sworn affidavit" or to "a licensed child-care facility including a foster home, group home, temporary boarding home, or facility for the housing of neglected, abused, or emotionally disturbed children." *Id.*

It is, of course, axiomatic that this Court resolves only controversies as they actually exist. Because the lower courts have yet to take evidence on how the INS's current policy is being applied or is intended to be applied, this Court's decision could amount to little more than an advisory opinion on a superseded

policy.¹⁷ The INS is free to seek relief from judgment as the facts warrant; on this record, however, certiorari is plainly inappropriate.

CONCLUSION

For the foregoing reasons the writ should be denied. If it so desires, the INS may then present its reformed juvenile detention policy, and any evidence it may have that its current practice serves any legitimate governmental purpose, for the consideration of the district court.

Respectfully submitted.

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FEBRUARY 1992

¹⁷ Of course, it remains to be seen to what extent the INS's memorandum will actually ease the plight of detained children. Respondents note, for example, that the memorandum is not a formal regulation, and how INS officers will resolve conflicts between the regulations and the memorandum will require further exploration of the facts.

APPENDIX

Memorandum

Subject: National Policy Date: DEC 13 1991
 Regarding Detention
 and Release of
 Unaccompanied Alien Minors

To: Regional Operations From: Office of
 Liaison Officers the Commissioner
 District Directors
 Chief Patrol Agents

The purpose of this memorandum is to standardize the procedures nationwide regarding the detention, release, and treatment of unaccompanied alien minors in INS custody. This memorandum should be distributed to all INS field personnel.

The policy of the Immigration and Naturalization Service (INS) regarding the detention and release of unaccompanied alien minors is as follows:

(1) All alien minors¹ apprehended by INS or turned over to the custody of INS by state or local law enforcement agencies are to be processed for deportation or voluntary departure in accordance with 8 C.F.R. § 242.24(g) and (h).

(2) While awaiting processing, alien minors may be held by INS authorities in INS detention facilities having separate accommodations for juveniles or, if

¹ An alien minor is defined as a male or female foreign national, under 18 years of age, who is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act (Act) or has an application for asylum pending before the INS.

such accommodations are unavailable, in suitable state or county juvenile detention facilities².

(3) No alien minor may be held in a detention facility, whether an INS facility or otherwise, longer than 72 hours unless the alien minor:

(a) is charged with or convicted of a criminal offense, other than entry without inspection;

(b) is adjudicated a delinquent, or is the subject of a pending delinquency proceeding;

(c) has engaged in violent or extremely disruptive conduct which requires that he or she be held in a secure facility for the safety of himself and/or others;

(d) is an escapee from another facility;

(e) is an unrepresented Salvadoran and an alternative placement is unavailable in the district where the juvenile came into INS custody (in which case the alien minor may not be transferred from the district for at least seven days);

(f) cannot be moved for other extraordinary and compelling reasons. In this case, permission from the Juvenile Coordinator or Assistant Commissioner from Detention and Deportation must be obtained before detaining the alien minor for longer than 72 hours.

(4) Except for (3) above, an alien minor shall be released from INS custody, in the following order of preference, to:

(a) a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, grandparent);

² A suitable juvenile detention facility is defined as a secure facility designated for the occupancy of juveniles. Juveniles charged with delinquent acts are held in these facilities for a temporary period while awaiting adjudication of their court cases. Every effort must be taken to ensure that the safety and well-being of the alien minors detained in these facilities are satisfactorily provided for by the detention staff at the juvenile detention facilities.

(b) a responsible adult designated by the parent or legal guardian in a sworn affidavit;

(c) a licensed child-care facility³ including a foster home, group home, temporary boarding home, or facility for the housing of neglected, abused, or emotionally disturbed children.

(5) Before an alien minor may be released from INS custody, the person or facility assuming custody must execute an agreement to:

(a) provide for the alien minor's physical, mental, and financial well-being;

(b) ensure the alien minor's presence at all future proceedings before the INS or immigration judge;

(c) notify INS of any changes in address of the alien minor; and

(d) not transfer custody of the minor to another person or facility without prior written permission of the District Director or Chief Patrol Agent.

6) INS shall assist, without undue delay, with transportation arrangements to the INS office nearest to the location of the person or child-care facility to whom the alien minor is to be released.

7) INS may require the posting of a bond to ensure the presence of the alien minor at all future immigration proceedings.

8) If the alien minor cannot be released as set forth in paragraphs (4) and (5) above within 72 hours, INS shall place the alien minor temporarily in an INS-contracted group or foster home until such time as

³ A child-care facility is defined as a facility that provides care, training, education, custody, treatment, or supervision for a minor who is not related by blood, marriage, if adoption to the owner or operator of the facility, whether or not the facility is operated for profit. Licensed means approved by the appropriate state agency. An INS detention facility or a state or county juvenile detention facility is *not* a child-care facility under this definition.

release in accordance with paragraphs (4) and (5) can be affected or until the conclusion of the immigration proceedings, whichever is earlier. The unavailability of an INS-contracted child-care facility within the jurisdiction of the INS-contracted child-care facility within the jurisdiction of the INS district sector in which the alien minor is being held does not justify detention for more than 72 hours in a juvenile or adult detention facility, except in extraordinary and compelling circumstances and with the permission of the Juvenile Coordinator or Assistant Commissioner for Detention and Deportation.

9) An alien minor should be transferred from one child-care facility to another only in the most compelling circumstances. The alien minor should be transferred with all his possessions and his legal papers. No minor who is represented by counsel in an INS proceeding shall be transferred without advance notice to such counsel, nor shall any minor be denied access to legal services at the location to which he or she is transferred.

10) The 72 hour limit for detention of alien minors commences when INS assumes custody of the juvenile.

11) The Juvenile coordinator in the Office of the Assistant Commissioner for Detention and Deportation shall maintain an up-to-date record of all alien minors in INS custody. Statistical information shall be collected weekly from all INS District Offices.

Any questions regarding this national policy should be directed to Mary Ruth Calhoun, Juvenile Coordinator, HQDDP, at FTS 368-4120 or Patricia B. Feeney, Assistant General Counsel, HQCOU, at FTS 368-2895.

Gene McNary
Commissioner

5

No. 91-905

In the Supreme Court of the United States

OCTOBER TERM, 1991

**WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS**

v.

JENNY LISETTE FLORES, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

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BEST AVAILABLE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-905

WILLIAM P. BARR, ATTORNEY GENERAL
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v.

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TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR THE UNITED STATES

1. The general thrust of respondents' Brief in Opposition is that the decision of the court of appeals is "narrow" and has "no significant impact on the administration of the immigration laws." Br. in Opp. 16. To the contrary, the court of appeals has held that unspecified provisions of the Constitution prohibit a significant program that indisputably affects thousands of children a year,¹ all the while acknowledging that the program

¹ Respondents chide us (Br. in Opp. 20 & n.15) for noting in our petition (Pet. 25) that INS has advised us that it held approximately 1700 hearings while it complied with the district court's order pending appeal, and suggest, based on information obtained under the Freedom of Information Act, that they believe the

fully comports with the intent of Congress as reflected in Title 8. Whatever the merits of this decision, it is certainly not correct to characterize it as narrow.

Along the same vein, respondents claim (Br. in Opp. 23-24) that INS has substantially narrowed the dispute by modifying the policy that was considered by the courts below. This claim is completely unjustified. The National Policy reprinted in Br. in Opp. App. 1a-4a does not present a major change and is in all important respects identical with the consent decree (Pet. App. 148a-204a) on which the decision below was premised. See Pet. 6-8 (discussing consent decree). At the core of both documents is INS's decision that it generally will transfer detained alien children to a juvenile care facility within 72 hours. Compare Pet. App. 148a-149a ("except in unusual and extraordinary circumstances * * * the federal defendants shall house all juveniles detained more than 72 hours following arrest in a facility [that meets the standards of the Child Care Memorandum described at pages 6-8 of the petition]") with National Policy § 3, Br. in Opp. App. 2a ("No alien minor may be held in a detention facility, whether an INS

number of hearings was much smaller. Respondents concede in the same passage, though, that it is perfectly proper to direct the Court's attention to official agency records that may be relevant to an issue before the Court.

Since we received respondents' brief, the Executive Office of Immigration Review has reviewed its official computer records and explains that the number of hearings identified in our petition was accurate, but that the hearings took place over a 40-month period (from June, 1988, through September, 1991), rather than a 22-month period, as stated in the petition; similarly, the much smaller number identified in the Brief in Opposition is correct, but covers a still smaller 15-month period. We seriously regret any inconvenience the confusion over these statistics may have caused the Court. In any event, the fact remains that the 1700 unnecessary hearings present a considerable diversion of administrative resources, even when spread over the longer period.

facility or otherwise, longer than 72 hours [except in unusual circumstances detailed in the six following subparagraphs]."). As we stated in our petition (Pet. 7 n.8), the practice "throughout the country generally [has] follow[ed] the terms of the decree"; the policy on which respondents rely is nothing more than a formalization of the informal policy described in note 8 of our petition.²

2. Respondents also argue (Br. in Opp. 9-15) that unsatisfactory conditions in INS detention facilities justify the relief entered by the courts below. The problem with this argument, though, is that these deplorable conditions were addressed and remedied during earlier proceedings in this case, including the detailed and comprehensive consent decree described at pages 6-8 of our petition. See Pet. App. 148a-204a (reprinting the consent decree and the descriptive materials attached to it).³ Furthermore, the caliber of INS's compliance

² Respondents err in claiming (Br. in Opp. 3, 23) that provisions of the National Policy allowing release to responsible adults designated by the parent or to licensed child-care represent significant changes from prior practice. The provision allowing release to responsible parents, see National Policy § 4(b), Br. in Opp. App. 3a, parallels 8 C.F.R. 242.24(b)(3) (discussed at Pet. 6), which at all relevant times has allowed release to persons designated by the parent. Similarly, the provision allowing release to licensed child-care facilities parallels the provision in 8 C.F.R. 242.24(b)(4) (discussed at Pet. 6) allowing release to other adults in unusual circumstances, as well as the requirement of the CRS Standards (discussed at Pet. 6-7) that juvenile care facilities comply with state licensing requirements. See Pet. App. 176a.

³ For example, respondents' description of the facilities as involving barbed wire, security fences, and other prison-like characteristics (see Br. in Opp. 9-10) is addressed by the requirement that the shelters provide "an open type of setting without a need for extraordinary security measures." Pet. App. 173a. Similarly, the concerns regarding education and recreation (Br. in Opp. 11-12) are addressed in detailed requirements for "a structured classroom setting, Monday through Friday," with a curriculum that "concen-

with that decree is totally irrelevant to the question presented by the petition: whether, *in light of that decree*, the Constitution nevertheless prohibits INS from declining to release a child to an unrelated adult unless it can produce affirmative evidence of the likelihood that the adult would harm the child. In sum, respondents' remedy for a violation of the consent decree is an order enforcing the decree, not, as respondents implicitly suggest, an order based on the Due Process Clause requiring INS to release children to unrelated adults.⁴

trates primarily on the development of basic academic competencies," Pet. App. 182a, requirements for bilingual services as appropriate, *id.* at 173a, 183a, and requirements for supervised recreation as well as specified recreation equipment, *id.* at 183a. Furthermore, the materials discussed by respondents at Br. in Opp. 13-15, which suggest that it would be better to release children to unrelated adults than to jail them, are beside the point because the consent decree requires that the children covered by the order of the court of appeals not remain in detention facilities for more than 72 hours except in "unusual and extraordinary circumstances." Pet. App. 148a.

The other concerns raised in this section of respondents' brief are addressed by other provisions outside the consent decree. First, the concern regarding INS's failure to segregate children from adults of the opposite sex (Br. in Opp. 10) is addressed by 8 C.F.R. 242.24(d), which requires the juvenile to be housed apart from unrelated adults, unless the juvenile is in the care of a related female adult. See Pet. 6 n.6. Finally, as respondents themselves note (Br. in Opp. 11 n.9), the allegations regarding strip searching (Br. in Opp. 11) were dealt with in a separate injunction issued by the district court in 1988. See *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988).

⁴ Respondents also suggest (Br. in Opp. 7 n.5) that the period in INS custody is unreasonably delayed because of the unwillingness of Los Angeles courts to grant temporary guardianship to respondents. As the record shows, however, the state court took this action only in response to an order by the federal district court regarding an abuse of temporary guardianship appointments by alien children and their representatives, pursuant to which "after

3. Finally, respondents contend (Br. in Opp. 21-23) that the government's position is inconsistent with this Court's recent decision in *INS v. National Center for Immigrants' Rights*, 112 S. Ct. 551 (1991) (*NCIR*). Relying on the Solicitor General's statement that the INS does not impose no-work conditions on alien bonds without first making an individualized determination that the aliens are ineligible for work, respondents argue that the decision requires the INS to conduct individualized hearings in each case to determine the suitability of release to any available adult.

This argument begs the question at issue in this case. As we explain in our petition, the central issue is whether the Constitution requires the government to release an alien child to an unrelated adult in the absence of specific evidence that the adult will harm the child. See Pet. 23. If the government is entitled, as a substantive matter, to prohibit release to unrelated adults (without regard to the existence of any particularized evidence of risk to the child), then it would be pointless to require a hearing on the question. See Pet. 23 n.21. In our view, the only relevant fact in this situation is whether there is a related adult available to whom the child can be released. There is no more reason to believe a formal hearing is required on that point than there was to require a formal hearing in *NCIR* to determine the alien's eligibility for work. See *NCIR*, 112 S. Ct. at 558-560.

In sum, respondents' arguments in favor of individualized hearings can prevail only if they establish that the Constitution prohibits INS from adopting the substantive standard respondents challenge in this case. We believe the court of appeals' conclusion that

such appointment is made, the guardian and the minor were never seen again." Clerk's Record, entry 14 (July 19, 1985 minute order).

the Constitution does prohibit INS from adopting that standard merits plenary review.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

FEBRUARY 1992

(6)
No. 91-905

Supreme Court, U.S.
FILED
MAY 6 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI
FILED: DECEMBER 9, 1991
CERTIORARI GRANTED: MARCH 2, 1992**

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-905

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL., RESPONDENTS

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Docket No. 85-4544

JENNY LISETTE FLORES, ET AL., PLAINTIFFS

v.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATED	NR	PROCEEDINGS
		* * * * *
7-11-85	d	1. Fld compt. Issd summs. Case may be ref'd to Mag Penne for dscvry.
7-18-85	mc	2. Pltf's second set of exhibits.
7-12-85	mc	3. Pltf's 1st set of exhibits.
		* * * * *
7-30-85	mc	20. Pltf's 3rd set of exhibits.
		* * * * *
11-8-85	mc	50. Pltf's Fourth set of Exhibits.
		* * * * *
3-19-85	kb	76. 5th set of exhs. pltfs 77. 5th set of exhs. pltfs 78. 5th set of exhs. pltfs 79. 5th set of exhs. pltfs
		* * * * *
3-27-86	kb	88. 6th set of exhs, pltfs
		* * * * *

DATED	NR	PROCEEDINGS
4-23-83	kb	97. 7th set of exhs. pltfs * * * * *
5-29-86	le	125. pltfs' 8th set exht 82-83 * * * * *
8-11-86	lpc	142. ORD re class CERTIF that ex- cept as agst Corrections Corp. of America, actn shl be main- tained as class actn. * * * * *
4-21-87	fbr	159. Plft's 9th set of exhbts part 1 ex- hbts 85-86. 160. Plft's 9th set exhbts part 2; ex- hbts 87 to 89. 161. Plft's 9th set of exhbts part 3; ex- hbts 90 to 93. 162. Plft's 9th set of exhbts part 4; ex- hbts 94 to 95. 163. Plft's 9th set of exhbts part 5; ex- hbts 96 to 118. * * * * *
5-11-87	fbr	171. Plft's 10th set of exhbts. (exhbts 121 to 140). * * * * *
5-24-88	wh	256. ORD & JGMNT tht pltf mot S/J is Granted & deft mot S/J DENIED; tht defts shl release any minor othwise eligible fr release on bond or recognizance to his parents, gurdian etc, any minor tkn into custody shl be

DATED	NR	PROCEEDINGS
		afforded admin hrg to detrmn probable cause fr his arrest etc (ENT 5-24-88) mid copies prties/w/note * * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 88-6249

JENNY LISETTE FLORES, ET AL., PLAINTIFFS-APPELLEES

v.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., DEFENDANTS-APPELLANTS

RELEVANT DOCKET ENTRIES

DATED	FILING-PROCEEDINGS
* * * * *	
7-25-88	DOCKETED CAUSE AND ENTERED APPEARANCE OF COUNSEL. Sent appellant(s) civil appeals docketing statement. (cck)
* * * * *	
6-20-90	FILED OPINION: REVERSED REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. WALLACE, author; FLETCHER, dissenting; George.) FILED AND ENTERED JUDGMENT. [88-6249] (ck)
* * * * *	
8-9-91	FILED OPINION: The majority panel opinion is VACATED and the order of Judge Kelleher is AFFIRMED in all respects. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Heard en banc; Mary M. SCHROEDER, author.) FILED AND ENTERED JUDGMENT. [88-6249] (sw)

DATED	FILING-PROCEEDINGS
* * * * *	
12-23-91	MANDATE ISSUED [88-6249] (dmd)
3-6-92	Filed Supreme Court order (SC Date: 3/2/92): The petition for writ of cert. is GRANTED. [88-6249] (sw)

18 U.S.C. § 5034

Duties of magistrate

The magistrate shall insure that the juvenile is represented by counsel before proceeding with critical stages of the proceedings. Counsel shall be assigned to represent a juvenile when the juvenile and his parents, guardian, or custodian are financially unable to obtain adequate representation. In cases where the juvenile and his parents, guardian, or custodian are financially able to obtain adequate representation but have not retained counsel, the magistrate may assign counsel and order the payment of reasonable attorney's fees or may direct the juvenile, his parents, guardian, or custodian to retain private counsel within a specified period of time.

The magistrate may appoint a guardian ad litem if a parent or guardian of the juvenile is not present, or if the magistrate has reason to believe that the parents or guardian will not cooperate with the juvenile in preparing for trial, or that the interests of the parents or guardian and those of the juvenile are adverse.

If the juvenile has not been discharged before his initial appearance before the magistrate, the magistrate shall release the juvenile to his parents, guardian, custodian, or other responsible party (including, but not limited to, the director of a shelter-care facility upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.

DEPOSITION OF ROBERT J. SCHMIDT

* * * * *

REQUEST NO. 34:

Mr. Ernest E. Gustafson, the INS District Director for Los Angeles personally decided in August, 1985 to release a minor who was eight months pregnant to the custody of an aunt or cousin. She was flown to Phoenix at government expense to live with her mother who is illegally in the United States. In May or June, 1985, Mr. Gustafson personally authorized the release of a 17-year-old girl who was very ill to the custody of a relative in Washington, D.C. In July or August 1985, Mr. Gustafson personally authorized the release of a girl, age 15, who had a one-year-old child, to the custody of her husband, age 20.

77 CR 509-10.

DEPOSITION OF HAROLD EZELL

* * * * *

Q. Before this memorandum was issued, what was the policy in the Western Region with regard to release on bond of unaccompanied minors?

A. I don't really recall exactly what it was at that point. The reason that I felt it was necessary was I felt I had a moral responsibility to make sure that those children were not released to just anybody who says that I am a nice guy and I want to take care of this child. I feel at the time we got enough milk cartons with pictures on them and we don't need any more. We had an issue that arose in San Diego over a child, which quite interestingly the Court upheld our position at that point and your folks didn't pursue that lawsuit, but that was the policy that I felt was fair to the child. That's what it is today.

Q. So, is it your testimony you don't know what the policy was before you issued this memo?

* * * * *

76 CR 20-21

* * * * *

Q. To your knowledge, has a minor released by the Immigration and Naturalization Service to a parent or legal guardian been harmed or neglected in any way?

A. I don't know that.

Q. Before issuing this policy memorandum, again, referring to Plaintiffs' Exhibit 17, did you attempt to find out whether any individual, any unaccompanied minor released by the Immigration and Naturalization Service to a nonparent or nonguardian have been harmed or neglected in any way?

A. Not to my knowledge.

Q. Before issuing the memorandum, Plaintiffs' Exhibit 17, did you conduct any study or any investigation as to what impact this policy memorandum would have on the length of time unaccompanied minors would be detained?

A. No.

Q. Before issuing this policy memorandum, Plaintiffs' Exhibit 17, did you make any efforts to investigate or do a study of the conditions existing in facilities where unaccompanied minors are detained?

A. No, I did not.

* * * * *

Q. Now, before issuing this policy memorandum, Plaintiffs' Exhibit 17, did you attempt to investigate or study how long it takes to get a guardian appointed in the Superior Courts of California?

* * * * *

THE WITNESS: No, I didn't.

* * * * *

To your knowledge, had the agency ever been sued because it released an unaccompanied minor to an individual that harmed or neglected that minor?

A. No to my knowledge.

Q. Since this memorandum was issued, has the agency ever been sued because it released a minor to someone who harmed or neglected that minor?

A. Not to my knowledge.

* * * * *

76 CR 25-27

* * * * *

Q. So, just to make sure the sole purposes of this policy then are two: to protect the welfare and well-being of the minor and protect the Service from possible legal liability?

A. That is correct.

* * * * *

Q. Now, to your knowledge, how is an unaccompanied minor advised that he or she will be released to in most cases no one other than a parent or legal guardian?

A. I don't know.

Q. How is an attorney who represents a detained unaccompanied minor advised that the minor will be released generally only to a parent or legal guardian?

A. I don't know.

Q. To your knowledge, are there any uniform proceedings in the Western Region by which such notice will be given?

A. No.

* * * * *

76 CR 45-46

* * * * *

Q. Did anyone advise you as to what practices, for example, of the State juvenile justice systems or Federal Courts when they encounter a juvenile or with regards to releasing?

A. No.

* * * * *

76 CR 56

* * * * *

Q. Is part of the task of the District Directors to locate, apprehend and return aliens who are unlawfully in the United States?

A. Yes.

Q. Do they also set the amount of bond?

A. Yes.

Q. The Chief Patrol Agents have also the responsibility to apprehend aliens that they believe are aliens who are unlawfully within the United States?

A. Yes.

* * * * *

76 CR 67

* * * * *

The question is: why have you not so implemented a practice of providing some form of education at other detention sites?

A. As a list of reasons, we are not required to. It is not our function. It is costly. One would have to address being educated in English, Spanish, Chinese or other language.

* * * * *

76 CR 403

DEFENDANT'S RESPONSE TO REQUEST FOR ADMISSIONS

* * * * *

REQUEST FOR ADMISSION NO. 22:

Admit that the INS has made no study comparing whether a juvenile released to a parent or legal guardian is more or less likely to be harmed or neglected than if released to someone other than a parent or legal guardian.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

Admitted. The INS presumes that harm or neglect will be less likely if a minor is in the custody of a person such as a parent or legal guardian, who has a legal obligation to care for the child.

* * * * *

78 CR 1238-39

DEPOSITION OF ANA MARIA MARTINEZ PORTILLO

* * * * *

Q. What happened after Mr. Hughes left?

A. They searched me and they undressed me very ugly.

Q. Who do you mean when you say "they"?

A. The ones that work there.

Q. In asking these questions, I am not trying to embarrass you. I am trying to find out what happened.

Who was in the room when you were searched?

A. Just a lady.

Q. One lady?

A. Yes.

Q. Was this the same lady who searched you the time before?

A. No. It was a different one.

Q. Did she touch you in the same ways that the lady had done the time before?

A. No.

Q. Did she touch you at all?

A. She didn't touch me but she had me undress everything.

Q. Including your underwear?

A. Yes. I was very embarrassed.

Q. The she looked at you with no clothes on?

A. Yes.

Q. And she didn't touch you?

A. No.

Q. Did she ask you to turn around?

A. Yes.

Q. And then she told you to put your clothes back on?

A. Yes.

Q. And that was the end of it?

A. Yes. They did it three times that way.

Q. That same day?

A. No. Separate days.

Q. Was it after visits?

A. One time when Mr. Alba arrived and another time and two times when the attorney.

Q. Was it Mr. Hughes both times?

A. Yes.

Q. It wasn't his assistant?

A. No. When they did the first time, I told him that I wasn't going to go anywhere and he told me why and I told him because they undressed us very ugly.

Q. What do you mean "very ugly"?

A. Well, I felt very badly.

Q. She didn't touch you?

A. No.

Q. Was she angry?

A. No.

Q. Did she shout at you?

A. Yes.

Q. What did she shout?

A. Since I didn't want to undress, she told me—she obligated me and threatened me.

Q. She said you had to?

A. Yes.

* * * * *

* * * * *

0059 10:45:47 05/23/86

FM:DIDIR JINS BALTIMORE, MARYLAND

TO:COMMR COCOU JINS WASHINGTON, D.C.

DJJIER

BT

UNCLAS

ATT: PAUL W. VIRTUE, COCOM

BEKEB COCOU 5/15/86. FLORES ET AL V. MEESE
ET AL.

PRIOR TO R.M. KISOR'S MEMORANDUM DATED
3/19/86, THIS DISTRICT POLICY FOR RELEASING
AS JUVENILE DETAINEE WAS PURSUANT TO
POLICY MEMORANDUM CO-242.1 P DATED 4/4/81.
JUVENILE WAS RELEASED TO PARENT, FAMILY
MEMBER OR A RESPONSIBLE ADULT.

BT

* * * * *

163 CR 1209

* * * * *

0024 17:29:08 05/23/86

FM DIDIR JINS EL PASO TX

TO ROCOM (RODDP) JINS DALLAS TX

BEJEK 05/16/86

UNACCOMPANIED JUVENILES WITH NO EXISTING
EQUITIES IN THE UNITED STATES SUCH AS
PARENT, SISTER, BROTHER, AUNTS, UNCLES,
ETC., ARE HANDLED WITH THE COOPERATION
OF THE FOREIGN GOVERNMENT CONSUL WHERE
ARRANGEMENTS ARE MADE ACCORDING TO THE
OUTLYING INSTRUCTIONS OF THAT FOREIGN
CONSUL.

WHEN UNACCOMPANIED JUVENILES ARE BOND-
ED OUT BY SOME PERSON ALLEGING RELATION-
SHIP RESIDING IN ANOTHER DISTRICT, THE RE-
LATIONSHIP IS VERIFIED BY THE OFFICE ACCEPT-
ING BOND AND INSTRUCTIONS ARE OBTAINED AS
TO RELEASE TO EITHER THE PROPER RELATION
OR ATTORNEY. ALL RELATIONSHIPS ARE VERI-
FIED BY NOTORIZED AND EXECUTED AFFIDAVITS
WITH SUPPORTING, IDENTIFYING DOCUMENTS
ESTABLISHING THAT SUCH A RELATIONSHIP [sic]
EXISTS AND THE PARENTS HAVE GIVEN WRITTEN,
NOTORIZED PERMISSION AS TO THE CUSTODY OF
THE CHILD.

WHEN UNACCOMPANIED JUVENILES ARE RE-
LEASED ON BOND WITH NO RELATIVES EXISTING
IN THE UNITED STATES, THE JUVENILE IS TURN-
ED OVER TO THE ATTORNEY REPRESENTING THE
ALIEN OR WHOEVER HAS SUBMITTED PROPERTY
EXECUTED G-28 ON THE JUVENILE'S BEHALF OR
HIS AUTHORIZED PARALEGAL.

* * * * *

163 CR 1213

DEPOSITION OF KIM CARTER HENDRICK

* * * * *

Q. Would it be fair to say that prior to the Ezell policy the practice was to require a responsible adult even though he or she was not a parent or legal guardian?

A. Yes.

* * * * *

162 CR 915

DEPOSITION OF ROBERT J. SCHMIDT

* * * * *

A. Oh, the whole range of problems that the policy addresses, simply put, if we were less restrictive upon who we would allow juveniles to be placed with, it certainly would be advantageous and decrease our detention costs and detention space utilization, but would the adverse factors off balance it?

Q. What were those adverse factors that were discussed, either with Miss Calhoun or with Mr. Brian or Miss Higgins or with the General Counsel's office?

A. The possibilities of liability to the government in placing a child in an improper environment, which covers a vast range of adverse things that could occur, the affect on how frequently or infrequently the juvenile would then reappear for further proceedings, the absence or increase of deterrent effect which my result, and if every juvenile apprehended is routinely turned over to anyone who claims them, would that set up a syndrome by which more and more juveniles would come because there would be no deterrence to coming. They would get exactly what they want.

All those balancing factors were — as any decisions and policies that we discuss are considered.

Q. In terms of the liability issue, in any of your discussions, was there reference to any case in which the release of a minor to a person other than a parent or legal guardian had resulted in any type of claim against the government as a result of any mistreatment experienced by that minor?

A. I don't think any actions filed were discussed.

Q. To your knowledge, have there ever been such actions filed?

A. By that, do you mean filed as a result of placing a child with someone, other than the parent or guardian and a lawsuit filed as a result of it?

Q. Or a federal tort claim act filed.

A. Not that I'm aware of.

* * * * *

159 CR 25-26

* * * * *

Q. Prior to the issuance of the Kisor Memorandum, was any effort made by the agency to determine whether a minor released to an adult other than a parent or legal guardian was more or less likely to appear at future proceedings?

A. I know of no study.

* * * * *

159 CR 39

* * * * *

Q. Are you aware of any educational instruction which has been provided to any minors detained in western region?

A. Of a structured type, I am aware of none.

Q. Are you aware of any written INS policy which requires or suggests that a minor detained in the western region for more than any particular length of time should receive education instruction?

A. When you put it in the context of policy, I know of none.

Q. Are you aware of any written memorandum or directive of the agency requiring or suggesting that a minor detained for longer than any particular period of time be provided education and instruction?

A. I'm aware of none.

* * * * *

Q. Are you aware of any contract which requires that a contract facility provide education to minors detained for longer than a set period of time, other than the El Paso facility?

A. As you phrase the question, I have—I know of none.

Q. Is it the position of the INS that it is permissible to allow the commingling of detained minors with unrelated detained adults?

A. As you raise the question, it is my understanding that that is acceptable to the service under proper restraints.

Q. And by proper restraints, do you mean supervision by the contract facility or INS processing facility?

A. That's what I mean.

Q. Are you aware that in contract facilities in the western region, some of the minors share sleeping quarters with unrelated adults?

A. I'm aware of some incidents where some juveniles have shared sleeping quarters with unrelated adults,

* * * * *

159 CR 83-84

* * * * *

DIRECTLY NORTH OF THAT ON THE NORTH END THROUGH ANOTHER LOCKED SET OF GATES IS A SHADY AREA APPROXIMATELY 40 YARDS WIDE AND 60 YARDS LONG. AND, YES, THEY ARE ALLOWED ESSENTIALLY TO DO WHATEVER THEY WANT. SOME OF THE LITTLE KIDS PLAY IN THE DIRT, SOME OF THE WOMEN WILL TAKE THEIR CHAIR OUT AND SIMPLY SIT IN THE SHADE OR IN THE SUNSHINE. SOMETIMES THEY'LL TAKE LIKE A TOWEL AND SPREAD IT OUT AND PLAY CARDS OUT IN THE SUN. SOMETIMES THEY GO OUT THERE AND LET THEIR TONGUE HANG OUT IN THE HEAT.

BUT ESSENTIALLY THEY'RE ALLOWED TO DO WHATEVER THE VARIOUS RESIDENTS WANT TO DO, AND OUR AGE AND SEX POPULATION CHANGES SO OFTEN, WE MAY HAVE FOUR OR FIVE PEOPLE, FOR INSTANCE, PLAYING A TYPE OF SOCCER IN THE LONG AREA OR, IF WE HAVE NO BOYS, WE MAY HAVE GIRLS PLAYING JUMP ROPE. JUST ANY VARIETY OF THING. I GUESS YOU WOULD SAY KIND OF LIKE A SCHOOL YARD. IT DEPENDS ON THE ENTHUSIASM AND INGENUITY OF THE RESIDENT.

* * * * *

159 CR 201

DEPOSITION OF JERRELL A. SPRINKLE

* * * * *

Q. WELL, WHAT IS THE PRACTICE OF THE SUPERIOR COURT, IF THERE IS ANY POLICY, REGARDING APPOINTMENT OF TEMPORARY GUARDIANS TO MINORS IN I.N.S. DETENTION?

A. IT'S GENERALLY THE PRACTICE TO DENY EX PARTE TEMPORARY GUARDIANSHIPS FOR MINORS IN I.N.S. DETENTION.

* * * * *

163 CR 1138-39

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 85 4544-RJK (Px)

JENNY LISETTE FLORES, ET AL., PLAINTIFFS

vs.

EDWIN MEESE, III, ET AL., DEFENDANTS

[FILED AUG 11, 1986]

ORDER RE CLASS CERTIFICATION
[Proposed (amended)]

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Attorneys for Plaintiffs

Pursuant to Federal Rules of Civil Procedure 23(b)(2), plaintiffs move this Court for an order certifying this action as a class action. Having considered the briefs, declarations, and other evidence submitted by both sides, and the argument of counsel at the June 2, 1986, hearing on said motion, the Court finds as follows:

1. the class as defined below ("the class") is so numerous that joinder of all member is impracticable.

2. there are questions of law or fact common to the class;

3. the claims of the representative parties are typical of the claims of the class;

4. the representative parties will fairly and adequately protect the interest of the class; and

5. the federal defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Accordingly, IT IS HEREBY ORDERED that, except as against defendant Corrections Corporation of America, this action shall be maintained as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of the following classes:

1. All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the Immigration and Naturalization Service ("INS") within the INS' Western Region and who have been, are, or will be denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them.

2. All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the Immigration and Naturalization Service ("INS") within the INS' Western Region and who

have been, are, or will be subjected to any of the following conditions:

- a. inadequate opportunities for exercise or recreation;
- b. inadequate educational instruction;
- c. inadequate reading materials;
- d. inadequate opportunities for visitation with counsel, family, and friends;
- e. regular contact as a result of confinement with adult detainees unrelated to such minors either by blood, marriage, or otherwise;
- f. strip or body cavity search after meeting with counsel or at any other time or occasion absent demonstrable adequate cause.

Dated: August 8, 1986.

/s/ ROBERT J. KELLEHER
United States District Judge

Presented by:

James B. Morales,
one of the attorneys
for plaintiffs.

/s/ JAMES B. MORALES

DEPOSITION OF WILLIAM B. ANDERHOLT

* * * * *

Q. Is the E.C.I. facility licensed by the state of California as a juvenile detention facility?

A. No.

Q. Does the E.C.I. facility have any accreditation by, for example, the A.C.A. or any of the other associations as a juvenile facility?

A. I don't believe so.

Q. In your manuals and policy and procedures manuals, I believe we had talked earlier about whether there is anything in the contract or the statement of work regarding special treatment for juveniles, and you mentioned segregation of the population and recreational activities. Is there anything in addition to those two items that are not contained in the statement of work that are contained in your policy or procedures manual or other policy or procedure statements you may have?

A. No.

Q. Other than instructions three times a week in English, is there any other educational instruction that occurs in facilities in which juveniles are allowed to participate?

A. I don't believe there are any other additional resources except for educational television. There is television in each apartment which have educational stations in different languages including Spanish.

Q. Why don't you provide the juveniles there with additional educational instruction?

A. Because the movement is very — it's very difficult. The movement basically, on the average, the movement of our population probably would be, for a juvenile, in my opinion, would be on the average, one month.

Q. So the average juvenile stays there approximately one month; is that right?

A. That would be my—the average they would be approximately one month, I would say.

Q. Have you had or are you personally aware of any juveniles that have spent more than one month in the facility?

A. Yes, I am.

Q. In your experience, to the best of your recollection, what is the longest time a juvenile has spent there?

A. Almost one year. It will be one year July 7, 1986.

* * * * *

160 CR 399-400

DEPOSITION OF ALEXANDRIA WHITEHOUSE

* * * * *

Q. How long does it take, generally, from the filing of a petition seeking the appointment of a temporary guardian to hear and decide that request for appointment of a temporary guardian?

A. Well, they file the petition at the filing window, they come up to the probate attorney's office, and depending on how many people are ahead of them, they can be heard right away.

Q. Does the court do any kind of an investigation of the proposed guardian's qualifications before adjudicating an application?

A. No. It relies on the verified petition of the petitioner.

* * * * *

Q. What sort of representations have to be made in that verified petition?

163 CR 1158-59

171 CR 553 et seq.

INSTITUTE OF JUDICIAL ADMINISTRATION
AMERICAN BAR ASSOCIATION
JUVENILE JUSTICE STANDARDS
STANDARDS RELATING TO

* * * * *

These difficulties are caused or compounded by profound defects in the system of juvenile justice itself: in the inadequacy of the information and the decision-making process that leads to detention; in the delays between arrest and ultimate disposition; and in the lack of visibility and accountability that pervades the process.

In contrast to the pretrial stage, much greater care and sensitivity is usually devoted to the postadjudicative disposition, its facilities, and its alternatives to incarceration. The result, paradoxically, is considerably less detention under better conditions once the juvenile justice system ceases to presume that the juvenile is innocent.³

³ Several studies have indicated that far more juveniles are detained prior to adjudication than are incarcerated afterwards. See NCCD, "Juvenile Detention" in "Correction in the United States," 13 *Crime & Delinq.* 1, 11, 15, 36 (1967) (of 409,218 juveniles detained in 1965, only 242,275 were either committed after disposition to a facility or placed on probation); Ferster, Snethen, and Courtless, "Juvenile Detention: Protection, Prevention, or Punishment?" 38 *Fordham L. Rev.* 161 (1969) (in the jurisdictions examined, few of the detainees were ultimately removed from the community following disposition: Mass., 25.9 percent; Ill., 22 percent; Ohio, 19.5 percent; Texas, 9.7 percent; "Affluent County," 25 percent).

The paradox noted in the text has been observed by one court:

Traditionally, individuals accused of violations of law—whether they be defendants in adult criminal proceedings or respondents in proceedings technically denominated delinquency—have, curiously enough, fared far worse in matters of detention and treatment than those already adjudged guilty or "involved." Those convicted of offenses are normally assigned to institutions

The basis of reform in this area should be a new focus on the importance and integrity of pretrial decision making, and on the development of an informed, speedy, and responsible process. Standards must be formulated and rules imposed to limit the process, to the extent possible, to performing the historic function of bail in the criminal process—ensuring the presence of the accused at future court proceedings. The standards also need to recognize and regulate candidly the function that bail in the adult criminal process plays in fact, but declines to acknowledge in law—that some arrested persons are too obviously guilty and apparently too dangerous to others to be released by any reasonable judicial officer.

that are reasonably spacious, where there are ongoing programs of education and recreation, and where, at least on a relative basis, a reasonable number of counselors and other professionals are present to assist with problems and to help on the road to rehabilitation. On the other hand, those merely accused of wrongdoing are typically detained in structures that are little more than cages, with scarcely any programs, professional help, or space for anything but sleeping, eating, and an occasional walk in a narrow prison yard. To anyone looking at this situation without the blinders of the knowledge of "how things have always been" this must seem like an odd reversal of how things should be. Perhaps at a time when service of a sentence meant the rock pile of hard labor there was an advantage to the idleness of the pretrial prison. But now, when a primary aim of institutions for the adjudicated delinquent or the sentenced offender is rehabilitation, and when the programs designed to accomplish this process have become relatively humane—inadequate though they may sometimes be—the accused who is merely awaiting his trial, and who in the meantime rests securely on his presumption of innocence, is usually held under conditions far more barbaric than those prevailing at institutions for individuals whose guilt has already been adjudicated by a court or jury. While the historical and theoretical reasons for this anomaly are not difficult to understand, the situation still makes no sense. In the *Matter of Savoy*, Juvenile Case No. J-4808-70, at 30-31 (D.C. Super. Ct. January 11, 1973) (C.J. Greene).

This volume proceeds on the premise that the danger of too much detention before trial or disposition currently outweighs the dangers—both for juveniles and society—of too much release. As a result, the standards here seek to curtail severely—but not eliminate—the discretion to detain that presently characterizes the system. Reducing such discretion is to be accomplished by three methods: narrowing the criteria for permissible detention; reducing permissible delay in the system; and increasing accountability for and review of decisions that curtail interim liberty. The volume incorporates these features in a step-by-step description of the pretrial and predisposition process. Basic principles and general procedural standards are followed by individual sets of standards applicable to each agency and official responsible for the sequential stages of contact with the juvenile.

1. Definitional issues.

Two key definitional issues should be settled at the outset:

A. Pretrial release vs. interim status.

The juveniles who comprise the potential detention population addressed in this volume come from three separate stages of the juvenile justice process: preadjudication (before trial), predisposition (after conviction but before sentence), and preimplementation of the dispositional decision (until the sentence is put into effect).⁶ The volume thus governs processes beyond the pretrial stage to which the ABA, Standards for Criminal Justice, *Pretrial Release* (1968) (hereinafter cited as ABA Standards, *Pretrial Release*) were directed. The term “pretrial” detainee is, accordingly, inaccurate to describe the many juveniles in detention whose cases have already been adjudicated, but whose disposition is either undecided or unimplemented. As a substitute, the term “interim” is used

⁶ See commentary to Standard 2.1.

herein to refer to the entire portion of the juvenile process from the point of arrest until the carrying out of a dispositional placement, *i.e.*, to all decisions relating to release, control, and detention made during this period.⁷

B. Criminal vs. noncriminal offenses.

Only arrests on charges that would constitute violations of the criminal law if committed by adults are included within this volume.⁸ Juveniles taken into custody for conduct or status that would not be an adult crime, such as running away or incorrigibility, or who are in custody in a dual situation, such as a runaway arrested for burglary, are not part of the group addressed directly by these standards.

The implications of this limited applicability are important. Various studies have indicated that about half of all juveniles held in interim detention are charged with “juvenile” or noncriminal offenses.⁹ These standards are

⁷ See Standard 2.1.

⁸ Standard 1.1.

⁹ Ferster, et al., *supra* n. 5 at 195; Institute of Government, University of Georgia, “Regional Youth Development Center Study” 112-113 (1972); D. Beale & Schneider, *Juvenile Justice in New Jersey* 33 (1973); “Hidden Closets” 41 (1975). One commentator has made the following observations:

In most major cities, the nerve center of the juvenile justice system is the temporary center for juveniles. In Cook County, Illinois, this situation is the Arthur J. Audy Home for Children. Although it is supposed to provide only temporary shelter for children awaiting trial on delinquency charges, as a matter of fact most children there either have committed very serious criminal offenses such as murder or armed robbery or are simply runaway or “neglected.” A boy or girl who has committed a run-of-the-mill offense is normally allowed to go home if his parents will accept him, so the Audy Home houses children caught by both ends of the Juvenile Court net—the very bad and those whose parents do not want them. P. Murphy, *Our Kindly Parent—The State: The Juvenile Justice System and How it Works* 108 (1974).

therefore directly applicable only to the remaining half of the population of detention centers across the country. This does not, however, reduce the significance of this volume. On the contrary, the standards set out herein should become the foundation for standards dealing with juveniles held for noncriminal conduct. Indeed, standards applied to such juveniles, who by definition, present less of a risk to society, should restrict the use of detention even more than the standards in this volume.

II. Reform themes.

A. Restrictive detention criteria.

Restricted use of detention for juveniles is at odds with the traditions of juvenile justice. The juvenile court has historically been called upon to respond to all types of juvenile behavior—criminal and noncriminal alike—that parents could not handle. The extremely broad discretion vested in courts that stand as *parens patriae* has resulted in detention criteria and practices that permit incarceration to “protect” the misbehaving as well as the runaway or neglected juvenile. This is one explanation for the contrast between the restrictive detention criteria proposed in this volume and the broad, discretionary criteria of previous model codes and statutes. It is not a complete explanation, however, for some codes apply very broad criteria to juvenile criminal offenders alone.

Earlier codes and standards did not exhibit the sharp clash between the concepts of *parens patriae* and due process that has begun to characterize developments in juvenile justice.¹⁰ These codes emphasized the supremacy of the

¹⁰ See Rosenheim, “Detention Facilities and Temporary Shelters,” in *Child Caring: Social Policy in the Institution* 253 (Pappenfort, Kilpatrick, & Roberts eds. 1973); E. Schur, *Radical Nonintervention: Rethinking the Delinquency Problem* (1973); Wald, “Pretrial Detention

former, although detailed procedures to reduce the use of detention began to evolve in the 1950s. Typically, however, the codes used general and imprecise phrases to grant broad discretion to detain. The “Standard Juvenile Court Act,” published in 1959 by the National Probation and Parole Association (NPPA), predecessor of the National Council on Crime and Delinquency (NCCD) (hereinafter cited as “Standard Act”), permitted detention if the child’s “immediate welfare” or “the protection of the community requires that he be detained.” Section 16. This standard was tightened somewhat in 1961 when NCCD published its “Standards and Guides for the Detention of Children and Youth,” separating the consideration of criminal and non-criminal behavior by making eligible for “secure” facilities (the only ones defined as “detention”) only those juveniles “apprehended for delinquency” who (1) “are almost certain to run away;” (2) “are almost certain to commit an offense dangerous to themselves or to the community;” or (3) “must be held for another jurisdiction.” Section 17.

“The Legislative Guide for Drafting Family and Juvenile Court Act,” published in 1969 by the Children’s Bureau of the Department of Health, Education and Welfare (hereinafter cited as “Legislative Guide”), permits detention (1) “to protect the person or property of others or of the child,” (2) to protect the child if he lacks anyone “able to provide supervision and care for him,” and (3) “to secure his presence” in court. Section 20(a). The criteria incorporated in Section 14 of the “Uniform Juvenile Court Act,” drafted by the National Conference of Commis-

for Juveniles,” in *Pursuing Justice for the Child* 119 (Rosenheim ed. 1976); *Kent v. U.S.*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970). *But see Long v. Powell*, 388 F. Supp. 422, 429 (N.D. Ga. 1975) (depriving juvenile of rights he or she would receive as an adult is a denial of equal protection where no benefit received by juvenile).

sioners on State Laws in 1968 and approved by the American Bar Association the same year (hereinafter cited as "Uniform Act"), are substantially the same as those in the "Legislative Guide."

In its 1973 report, "Corrections," the National Advisory Commission on Criminal Justice Standards and Goals also distinguished between "detention" and other forms of "nonsecure residential care," and further recommended that noncriminal behavior be eliminated from the jurisdiction of the juvenile court. But in defining criteria for the detention decision, no attempt was made to identify the characteristics of the juvenile or the alleged crime which might be relevant to that decision. To discourage unnecessary detention, Standards 8.2 and 16.9 simply recommended that detention (1) "be considered as a last resort where no other reasonable alternative is available," and (2) that it "be used only where the juvenile has a parent, guardian, custodian, or other person able to provide supervision and care for him and able to assure his presence at subsequent judicial hearings."

The criteria for detention found in state statutes are hardly ever more specific than those recommended in the model codes, and are sometimes more vague. Juvenile court rules adopted in Minnesota referred to "the immediate welfare of the child" and to his "protection" without further elaboration, as justifying detention.¹¹ A Nevada statute, although containing some specific criteria, permitted determination if release was "impracticable or inadvisable."¹² Detention was permitted in New Jersey "if the nature of the offense requires" it.¹³ The statutes of every state contain some sort of catch-all phrase which,

¹¹ Minn. Stat. Ann. Juv. Ct. R. of P. Rule 7-1(1) (1969 Supp.).

¹² Nev. Rev. Stat. § 62.170(2) (1973).

¹³ N.J. Stat. Ann. § 2A:4-32 (1954).

by creating discretion, opens wide the door to detention.¹⁴

Some recent studies have exhibited a trend toward detention criteria that would effectively limit discretion to detain. The 1973 report, "Courts," published by the National Advisory Commission on Criminal Justice Standards and Goals recommends criteria that in some respects resemble guidelines in the present volume. These recommendations are not an official standard, however, but appear in the commentary to Standard 14.2 on "Intake, Detention, and Shelter Care in Delinquency Cases":

¹⁴ Ferster, et al., *supra* n. 5 at 164-167. Another interesting method for limiting detention to all but the most compelling circumstances is described in the court order dated December 19, 1972, issued by Judge Tom Dillon of the Fulton County (Atlanta, Georgia) Juvenile Court. The full text of that order included as Appendix A to the volume. The order sets a rigid maximum on the number of juveniles who may be held in the detention center, and then permits detention on the basis of a priority system. Thus, only the most serious cases are likely to result in detention because of the limited space available in the detention center.

This method could pose disadvantages. It would be unfortunate if the order were interpreted to permit detention in low priority situations if space were available in the detention center, even though other alternatives exist. Unless the detention facility were consistently filled to capacity with serious cases, detention of juveniles who would not otherwise be detained would be a possibility. The focus ought to be on whether detention is justified in each instance, rather than on whether the facility is overcrowded.

A second implication of the order is that juveniles falling within a high priority situation *should* be detained. There is no apparent pressure to search for alternatives to incarceration for these juveniles, and detention might, under this scheme, become automatic. Unless high priority categories are narrowly circumscribed, unnecessary detention may remain commonplace.

Yet, despite these theoretical criticisms, the Judge's order has had significant success:

The most amazing fact about Judge Dillon's order has been the success it has achieved. . . . In 1972, the last year before the

Prehearing detention should not be authorized unless the child is an escapee from either an institution for delinquent children or a penal institution; is alleged to be delinquent by reason of having committed an offense against a person that resulted in the victim requiring medical attention for his injuries; or has been found delinquent three or more times within the last year or at least five times within the past 2 years.¹⁵

Ferster and Courtless¹⁶ suggest criteria which are similarly specific, but more comprehensive. Separate criteria are outlined for secure and nonsecure (shelter care) detention. Each set is based almost entirely on concrete and readily identifiable facts about the juvenile. Automatic secure detention is recommended for the following juveniles:

1. Out-of-state runaways.
2. Escapees from institutions for delinquents or criminals.
3. Children accused of offenses against persons when the victim required medical attention for his injuries.
4. Juveniles accused of felonies who have more than one prior court referral for running away.

order went into effect, the total number of child days in the Child Treatment Center was 52,339. The average daily population was 142. In 1973, total child days were 30,217, a 57 per cent drop. The first six months of 1973 look even better, with an average daily population of 73. Collins, "One Solution to Overcrowded Detention Homes," 25 *Juv. Justice* 45, 49 (1974).

The author notes that in 1974, the Summit County Juvenile Court Center in Akron, Ohio, began a similar practice, with similar success. *Id.*

¹⁵ "Courts" 297.

¹⁶ "Juvenile Detention in an Affluent County," 6 *Fam. L. Q.* 3 (1972).

5. Those accused of selling addictive drugs.¹⁷

Discretionary detention would also be permitted for juveniles accused of crime who "have had three prior delinquency adjudications or five or more adjudications within the last two years."¹⁸

The 1975 report by California's Department of Youth Authority, "Hidden Closets: A Study of Detention Practices in California," is the latest example of the trend toward narrow detention guidelines. The study's advisory committee suggests three detention criteria, each of which is set out below in full text:

[1] Detention to Guarantee Minor's Appearance

No minor shall be detained to ensure his court appearance unless he has previously failed to appear, and there is no parent, guardian, or responsible adult willing and able to assume responsibility for the minor's presence.¹⁹

This formulation, like that of Ferster and Courtless and the National Advisory Commission, defines "likelihood of flight" not simply a guess about the future but as involving a finding that the juvenile fled the jurisdiction on a previous occasion.

[2] Detention for Minor's Own Protection

If protection of the child is the sole issue in cases where a petition has been filed under Section 602, Welfare and Institutions Code, secured detention may not be used unless the child's release presents an urgent or immediate danger to the minor's physical safety.²⁰

¹⁷ *Id.* at 31. The full text of the authors' suggested detention criteria is included as Appendix B to this volume.

¹⁸ *Id.*

¹⁹ "Hidden Closets" 60.

²⁰ *Id.*

The emphasis on immediacy and the *physical* safety of the juvenile marks an important advance over broader definitions in other model codes. The "Hidden Closets" advisory committee reasoned as follows:

Too often a minor's detention is justified on the basis that he will get into further trouble if he is released, and therefore detention is somehow "protecting" him from his own irresponsibility. This is a totally unacceptable reason for detention. Consideration of this factor would certainly be valid at the dispositional hearing, but there is no justification for denying liberty prior to trial on the basis that "maybe" the child will get into further difficulty and compound his unfortunate circumstances.²¹

This rationale is persuasive, and supports Standards 5.7 and 6.7 of this volume on protective custody and detention.

[3] Detention for Protection of Others

Pretrial detention of minors whose detention is a matter of immediate and urgent necessity for the protection of the person or property of another shall be limited to those charged with an offense which could be a felony if committed by an adult and the circumstances surrounding the offense charged involved physical harm or substantial threat of physical harm to another.²²

The "Hidden Closets" commentary to this recommendation state:

Law enforcement officers, probation intake workers, and judges and referees have free rein to decide when a child is considered "dangerous" to the public. There

²¹ *Id.* at 60-61. See also the commentary to Standard 3.3.

²² *Id.* at 63.

are few written guidelines; there are no restraints. Any child, regardless of his age, offense, or history of past behavior, may be considered "dangerous" under present laws.

Worse, there is no accountability. A decision-maker may actually believe a youth to be "dangerous" and order him detained, but he is not required to identify this as his reason for detention. He is only required to certify that "continued detention is a matter of immediate and urgent necessity for the protection of the child or the person or property of another." His real reason for detention may be cloaked by the "protection of the child" issue.

None but the most naive would suggest that our present diagnostic tools are so sharp that we can predict with accuracy who will or will not commit an offense within a two-week time span, the period of time normally required to conduct an investigation for the adjudication hearing.²³

The detention criteria developed in the present volume are similarly narrow and specific. In a number of respects they are more restrictive than in any of the codes and commentaries referred to above. General terms that confer broad discretion to detain have been replaced by standards that specify the relevant facts a decision maker must find in order to impose detention. The standards undertake to define the best interests of the juvenile and society, and to gear those definitions to the varying time and resources available to successive decision makers in the process.

For example, the arresting officer is required by Standard 5.6 to release all juveniles charged with offenses that

²³ *Id.* at 61-62. Others have noted that "dangerousness" is indeed difficult to predict. Ariessohn and Gonion, "Reducing the Juvenile Detention Rate," 24 *Juv. Justice* 28, 32 (1973).

would be misdemeanors if charged against an adult, except when the juvenile is in a fugitive status, or in physical or medical emergency situations. Severe limitations on the discretion to detain apply both to the juvenile facility intake official, who makes the initial decision to detain, and to the juvenile court. A strong presumption against detention is applicable in every case. This is implemented by barring interim detention unless the case involves an alleged criminal offense that would be a felony for an adult and, if proven, is likely to result in the commitment of the juvenile to a security institution *and* the juvenile falls into one of three categories specified in Standard 6.6 A. 1.: a. the crime charged is a class one juvenile offense involving violence; b. the juvenile is a fugitive from an institution; or c. the juvenile has compiled a demonstrable recent record of willful failure to appear at juvenile proceedings.

If none of these criteria is satisfied, the intake official and court may guard against an interim status risk only by means of conditions, supervision, or control short of detention. On the other hand, if the requirements of Standard 6.6 are met, detention may be ordered only upon a hearing that confers necessary rights and finds probable cause as provided in Standard 7.6, and exhausts the less restrictive alternatives of Standard 6.6 C.

The limited detention criteria contained in Standard 6.6 will no doubt generate an unavoidable but constructive tension with other standards in the volume. While on one hand this standard seeks to reduce detention to the point where only juveniles with very serious potential for interim flight or violence could be detained, other standards (*e.g.*, 3.4, 6.6 C. 3 and 10.3) simultaneously and somewhat inconsistently press for the use of nonsecure facilities whenever possible for persons who are detained. In other words, if properly and rigorously applied, Standard 6.6 tends to eliminate the need for nonsecure detention facili-

ties for juveniles charged solely with criminal conduct. This does not mean, however, that nonsecure facilities would have no function in juvenile justice, for the extensive noncriminal jurisdiction of the juvenile court will continue the need for such facilities.

B. Reduced delay.

Delay in the processing, adjudication, and disposition of criminal and juvenile cases compounds the disadvantages of detention, increases the risks of nonappearance and antisocial conduct if the juvenile is released, and is harmful to the interests both of the accused and the community. A number of states and commentators have addressed these problems. Nineteen states require a judicial detention hearing within a limited time following arrest.²⁴ Each of the model codes sets limitations on the time a child may be detained (a) prior to an adequate petition being filed with the court, and (b) prior to a court order of detention. Each code states these requirements somewhat differently:

"Legislative Guide":

- (a) Petition to be filed within twenty-four hours of admission detention. § 23(a)(1).
- (b) Court detention hearing to be held within twenty-four hours after petition is filed. § 23(a)(2).

"Uniform Act":

- (a) Petition to be filed "promptly." § 17(b).
- (b) Hearing to be held "promptly," at least within seventy-two hours after admission to detention. § 17(b).

"Standard Act":

- (a) Petition to be filed within twenty-four hours after admission to detention. § 17.2.

²⁴ M. Levin & R. Sarri, "Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States" 30 (National Assessment of Juvenile Corrections 1974).

(b) Court order to be issued within twenty-four hours after filing of petition. § 17.2.

"Model Rules":²⁵

(a) Petition to be filed prior to detention hearing. Rule 16.

(b) Hearing to be held within forty-eight hours after admission to detention *or* on the next court day following admission. Rule 15.

The National Advisory Commission's "Corrections" volume limits detention prior to the first judicial hearing to "over-night." Standards 8.2 and 16.9.

Extending further into the interim process, eleven states have enacted time limits on detention prior to adjudicatory hearings.²⁶ However, there appear to be no limits applicable to the final stages of the process: disposition and placement. Difficulties both in determining a proper disposition, and in implementing that decision, frequently cause juveniles to remain in detention for extended periods.²⁷ The adjudicatory and dispositional delays are so extensive in New York City that one court ruled in 1970 that the facilities in which these juveniles are detained should be governed by the same "right to treatment" standards applicable to "long-term detainees" at correctional facilities. *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1970).

The difficulty with decisions of this kind is that they may push treatment programs into predisposition stages of the juvenile system and thereby tend to institutionalize and legitimate the unwarranted detention that already exists. Rather than impose treatment on delayed-disposition

²⁵ NCCD, "Model Rules for Juvenile Courts" (1969).

²⁶ Sarri, *supra* n. 1 at 33; Levin & Sarri, *supra* n. 24 at 31.

²⁷ Wald, *supra* n. 10 at 126.

juveniles, a failure to complete the case within prescribed time limits should require release. The rationale for this conclusion has been succinctly stated by Patricia Wald:

The curse of juvenile courts has always been their lack of appropriate disposition resources for the variety of problem children they handle. The availability of detention facilities for holding juveniles indefinitely in lieu of a proper final placement thus has proved a convenient device for avoiding reform. Therefore, postadjudication and postdisposition detention must be strictly limited. After detention of (at most) a few weeks, release or transfer to a permanent placement should be mandatory. If a juvenile justice system in fact has no resources to treat or rehabilitate, the dilemma ought to be faced in open court and the juvenile released, if no proper placement is possible. A juvenile judge should not be allowed to feed the illusion, by recommending the placement or committing to an agency, that something is actually going to happen if it is not. Deadlines and absolute bars to detention may seem arbitrary, yet it is striking how frequently detention personnel ask for such limitations, realizing that they cannot cope with an unending stream of detainees.²⁸

To abbreviate detention during the entire interim process, and to limit the risks inherent in release, the standards in this volume require that all juvenile cases be processed at each stage within very brief, specified periods, each of them including weekends and holy days. The time limits are as follows:

1. arrest—release within two hours, or transportation to a juvenile facility (Standard 5.3);

²⁸ *Id.* at 126-27.

2. intake—release or petition for detention to be filed within twenty-four hours (Standard 6.5);

3. hearing—if custody continues, hearing to be held within twenty-four hours of filing of petition (Standard 7.6);

4. review—detention decision to be reviewed by the court every seven days (Standard 7.9);

5. adjudication and disposition—cases dismissed with prejudice if:

a. adjudication is not completed within thirty days of arrest if the juvenile is in a release status, and within fifteen days of arrest if the juvenile remains in detention for more than twenty-four hours following a court order of detention; or

b. final disposition is not determined and carried out within thirty days of adjudication if the juvenile is released, and within fifteen days of adjudication if the juvenile remains in court ordered detention following adjudication. These latter time constraints may be extended or waived only in limited and specified circumstances (Standard 7.10);

6. appeal—decision within ninety days when juvenile held in detention (Standard 7.14).

* * * * *

PART II: DEFINITIONS

2.1 Interim period.

The interval between the arrest or summons of an accused juvenile charged with a criminal offense and the implementation of a final judicial disposition. The term "interim" is used as an adjective referring to this interval, e.g., "interim status," "interim liberty," and "interim detention."

2.2 Arrest.

The taking of an accused juvenile into custody in conformity with the law governing the arrest of persons believed to have committed a crime.

2.3 Custody.

Any interval during which an accused juvenile is held by the arresting police authorities.

2.4 Status decision.

A decision made by an official that results in the interim release, control, or detention of an arrested juvenile. In the adult criminal process, it is often referred to as the bail decision.

2.5 Release.

The unconditional and unrestricted interim liberty of a juvenile, limited only by the juvenile's promise to appear at judicial proceedings as required. It is sometimes referred to as "release on own recognizance."

2.6 Control.

A restricted or regulated nondetention interim status, including release on conditions or under supervision.

2.7 Release on conditions.

The release of an accused juvenile under written requirements that specify the terms of interim liberty, such as living at home, reporting periodically to a court officer, or refraining from contact with named witnesses.

2.8 Release under supervision.

The release of an accused juvenile to an individual or organization that agrees in writing to assume the responsi-

bility for directing, managing, or overseeing the activities of the juvenile during the interim period.

2.9 Detention.

Placement during the interim period of an accused juvenile in a home or facility other than that of a parent, legal guardian, or relative, including facilities commonly called "detention," "shelter care," "training school," "receiving home," "group home," "foster care," and "temporary care."

2.10 Secure detention facility.

A facility characterized by physically restrictive construction and procedures that are intended to prevent an accused juvenile who is placed there from departing at will.

2.11 Nonsecure detention facility.

A detention facility that is open in nature and designed to allow maximum participation by the accused juvenile in the community and its resources. It is intended primarily to minimize psychological hardships on an accused juvenile offender who is held out-of-home, rather than to restrict the freedom of the juvenile. These facilities include, but are not limited to:

- A. single family foster homes or temporary boarding homes;
- B. group homes with a resident staff, which may or may not specialize in a particular problem area, such as drug abuse, alcohol abuse, etc.; and
- C. facilities used for the housing of neglected or abused juveniles.

2.12 Regional detention facility.

A detention facility that serves a geographic area of sufficient population to require a maximum daily capacity for that facility of twelve juveniles.

2.13 Citation.

A written order issued by a law enforcement officer requiring a juvenile accused of violating the criminal law to appear in a designated court at a specified date and time. The form requires the signature either of the juvenile to whom it is issued, or of the parent to whom the juvenile is released.

2.14 Summons.

An order issued by a court requiring a juvenile against whom a charge of criminal conduct has been filed to appear in a designated court at a specific date and time.

2.15 Treatment.

Any medical or psychiatric response to a diagnosis of a need for such response, including the systematic use of drugs, rules, programs, or other measures, for the purpose of either improving the juvenile's physical health or modifying on a long-range basis the accused juvenile's behavior or state of mind. "Treatment" includes, among other things, programs commonly described as "behavior modification," "group therapy," and "milieu therapy."

2.16 Testing.

The use of measures administered to the accused juvenile for the purpose of:

- A. identifying medical or personal characteristics, the latter including such things as knowledge, abilities, aptitudes, qualifications, or emotional traits; and
- B. determining the need for some form of treatment.

2.17 Parent.

Any of the following:

A. the juvenile's natural parents, stepparents, or adopted parents, unless their parental rights have been terminated;

B. if the juvenile is a ward of any person other than his or her parent, the guardian of the juvenile;

C. if the juvenile is in the custody of some person other than his or her parent whose knowledge of or participation in the proceedings would be appropriate, the juvenile's custodian; and

D. separated and divorced parents, even if deprived by judicial decree of the respondent juvenile's custody.

2.18 Final disposition.

The implementation of a court order of

A. release based upon a finding that the juvenile is not guilty of committing the offense charged; or

B. supervision, punishment, treatment, or correction based upon a finding that the juvenile is guilty of committing the offense charged.

2.19 Diversion.

The unconditional release of an accused juvenile, without adjudication of criminal charges, to a youth service agency or other program outside the juvenile justice system, accompanied by a formal termination of all legal proceedings against the juvenile and erasure of all records concerning the case.

PART III: BASIC PRINCIPLES

3.1 Policy favoring release.

Restraints on the freedom of accused juveniles pending trial and disposition are generally contrary to public

policy. The preferred course in each case should be unconditional release.

3.2 Permissible control or detention.

The imposition of interim control or detention on an accused juvenile may be considered for the purposes of:

A. protecting the jurisdiction and process of the court;

B. reducing the likelihood that the juvenile may inflict serious bodily harm on others during the interim period; or

C. protecting the accused juvenile from imminent bodily harm upon his or her request.

However, these purposes should be exercised only under the circumstances and to the extent authorized by the procedures, requirements, and limitations detailed in Parts IV through X of these standards.

3.3 Prohibited control or detention.

Interim control or detention should not be imposed on an accused juvenile:

A. to punish, treat, or rehabilitate the juvenile;

B. to allow parents to avoid their legal responsibilities;

C. to satisfy demands by a victim, the police, or the community;

D. to permit more convenient administrative access to the juvenile;

E. to facilitate further interrogation or investigation; or

F. due to a lack of a more appropriate facility or status alternative.

3.4 Least intrusive alternative.

When an accused juvenile cannot be unconditionally released, conditional or supervised release that results in the

least necessary interference with the liberty of the juvenile should be favored over more intrusive alternatives.

3.5 Values.

Whenever the interim curtailment of an accused juvenile's freedom is permitted under these standards, the exercise of authority should reflect the following values:

Supreme Court of the United States

No. 91-905

WILLIAM P. BARR, ATTORNEY GENERAL,
ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

ORDER ALLOWING CERTIORARI.
Filed March 2, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

March 2, 1992

7

No. 91-905

Supreme Court, U.S.

FILED

MAY 7 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Pursuant to 8 U.S.C. 1252(a)(1), the Immigration and Naturalization Service (INS) frequently retains custody of aliens under the age of 18 who are charged with being deportable, in circumstances where there is no parent, legal guardian, or other related adult available to care for the juvenile. 8 C.F.R. 287.3 requires INS to establish a prima facie case of deportability to an examining officer within 24 hours. The juvenile thereafter may seek an additional hearing before an immigration judge under 8 C.F.R. 242.2(d). If the juvenile is not released, INS places the juvenile in special child-care facilities for alien juveniles pending the location of a related adult or legal guardian or conclusion of the deportation proceedings. The questions presented in this case are these:

1. Whether the regulations violate the substantive due process component of the Fifth Amendment, or any other provision of the Constitution, because INS does not routinely release these juveniles to unrelated adults.

2. Whether the procedures violate the Due Process Clause of the Fifth Amendment because (a) once the examining officer has determined that there is a prima facie case of deportability, INS does not hold additional hearings to determine probable cause except upon request, or because (b) INS does not conduct individualized hearings to determine whether unrelated adults seeking custody pose a risk of harm to the juveniles.

II

PARTIES TO THE PROCEEDINGS

Petitioners are William P. Barr, Attorney General of the United States; Immigration and Naturalization Service; and Richard Rogers, Acting Regional Administrator of the Immigration and Naturalization Service.

Respondents are Jenny Lisette Flores, a minor, by next friend Mario Hugh Galvez-Maldonado; Dominga Hernandez-Hernandez, a minor, by next friend Jose Saul Mira; and Alma Yanira Cruz-Aldama, a minor, by next friend Herman Perililo T Sanchez.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-905

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-69a) is reported at 942 F.2d 1352. The opinion of the panel of the court of appeals (Pet. App. 70a-144a) is reported at 934 F.2d 991.¹ The order of the district court (Pet. App. 145a-147a) is unreported.

¹ An earlier version of the opinion of the panel of the court of appeals was reported at 913 F.2d 1315, but was superseded by the opinion reported at 934 F.2d 991.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1991. On October 30, 1991, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including December 7, 1991. The petition for a writ of certiorari was filed on December 9, 1991 (a Monday). This Court granted the petition on March 2, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Habeas Corpus Clause, Article I, Section 9, Clause 2, provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The Fifth Amendment provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

3. 8 U.S.C. 1252(a)(1) and 1357(a)(2) are set forth at Pet. App. 206a-207a.

4. 8 C.F.R. 242.2, 242.24, and 287.3 are set forth at Pet. App. 207a-221a.

STATEMENT

This case involves the response of the Immigration and Naturalization Service (INS) to a difficult and frequent problem: how to care for unaccompanied alien juveniles pending hearings on deportation charges. INS has concluded that it generally should release such juveniles to their parents, legal guardian, or other related adults. If none of those persons are available, however, INS normally entrusts their care to special child-care facilities supervised by the

Department of Justice. The court of appeals concluded that INS's procedures in this respect satisfy applicable statutory requirements, but held that the Constitution requires INS, unless it has specific evidence that the particular adults seeking custody will harm the juveniles, to release the juveniles to unrelated adults willing to assure the juveniles' presence at subsequent administrative hearings.

1. Congress has recognized that effective enforcement of the Nation's immigration laws necessarily requires power to arrest and detain aliens suspected of unlawful entry. Accordingly, 8 U.S.C. 1357(a)(2) authorizes INS to arrest an alien without a warrant if the arresting officer "has reason to believe that the alien so arrested is in the United States in violation of any * * * law or regulation and is likely to escape before a warrant can be obtained for his arrest."² Congress further required that an alien arrested under this section "shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." Section 1357(a)(2). This case concerns a challenge to the fundamental fairness of INS procedures pertaining to the detention of juveniles arrested pursuant to this statutory authority. We shall, accordingly, set forth those procedures in some detail.

a. Before deportation charges are instituted, apprehended individuals are first afforded the oppor-

² Title 8 also establishes procedures for arrests pursuant to warrants, but such warrants can be issued only if INS can establish probable cause to believe the alien is deportable, and only if INS already has instituted deportation proceedings before an immigration judge, as set forth in 8 C.F.R. 242.1(a), 242.2(c).

tunity to voluntarily depart the country under 8 U.S.C. 1252(b).³ If the alien declines voluntary departure, his case is reviewed by an INS examiner within 24 hours of arrest, 8 C.F.R. 287.3, and he may request a further hearing before an immigration judge.

INS procedures require that detained juveniles be fully informed of these options. Under 8 C.F.R. 242.24(g), the juvenile "shall be provided access to a telephone and must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list."⁴ After the juvenile has completed the phone call,⁵ INS furnishes

³ That Section provides, in pertinent part:

In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings * * * need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States.

⁴ The first sentence of Section 242.24(g) provides that juveniles from Mexico and Canada need only be informed of the opportunity to make a phone call; they need not actually contact someone. Pursuant to the Instructions to Form I-770, the agent must "make a record of any refusal to accept our offer of a telephone call." See App., *infra*, 1a. Pursuant to treaty obligations, however, the United States must contact "consular or diplomatic officers whenever nationals of [Canada or Mexico] are detained * * *, whether of the opportunity to make a telephone call; they need not requests that no communication be undertaken in his behalf." 8 C.F.R. 242.2(g). In any event, this case does not involve a significant number of juveniles from Canada or Mexico. See note 12, *infra* (describing the nationality of detained juveniles).

⁵ See Instructions to Form I-770 ("[T]he minor cannot be asked to voluntarily depart until after telephone access is provided."), App., *infra*, 1a.

the juvenile a Form I-770, titled "Notice of Rights and Request for Disposition." That notice is available in both English and Spanish versions. See App., *infra*, 1a-4a. INS regulations further provide that "[i]f the juvenile is under fourteen years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language the juvenile understands." 8 C.F.R. 242.24(h). The form explains in bold-face type that the juvenile "ha[s] the right to be represented by a lawyer [and] a right to a hearing before a judge," and further explains that the juvenile "should ask for a hearing before a judge" "[i]f for any reason you do not want to go back to your country." See App., *infra*, 3a.

The form then requires the juvenile to indicate whether he wishes to challenge his deportability or accept voluntary departure. This election is made by checking one of two boxes, labeled in bold-face type, "I request a hearing before a judge" or "I do not want to have a hearing before a judge." App., *infra*,

⁶ The instructions to Form I-770 require the officer to check boxes indicating whether the subject read the notice or the agent read the notice to the subject and, if so, in what language the notice was read. See App., *infra*, 1a. We note that the language of 242.24(h) refers to a form titled "Notice and Request for Disposition," which actually is the title of Form I-274 (discussed below). Notwithstanding this misnomer, the practice of INS under 242.24(h) is to offer all juveniles the Form I-770; the Form I-274 is offered only to those juveniles who indicate on the Form I-770 that they wish to accept voluntary departure. See Instructions to Form I-770, App., *infra*, 1a ("This advisal is required to be given to all persons who are taken into custody and who appear, are known, or claim to be under the age of eighteen and who are not accompanied by one of their natural or lawful parents.").

3a.⁷ If the latter box is marked, the juvenile is furnished a Form I-274, which allows the juvenile formally to accept voluntary departure. See App., *infra*, 5a-6a.⁸

b. If the juvenile indicates that he does not wish to accept voluntary departure, his case automatically is reviewed by an examining officer within 24 hours of arrest. 8 C.F.R. 287.3. The examiner determines whether "there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws." If such evidence exists, INS then institutes deportation proceedings against the juvenile under 8 U.S.C. 1242(a) by issuing an order to show cause on Form I-221S, pursuant to 8 C.F.R. 242.1. See App., *infra*, 7a-8a (reprinting Form I-221S).

c. Once deportation proceedings have been instituted, the Attorney General enjoys broad discretion under Section 1252(a)(1) to determine whether (a) to continue custody of the alien, (b) to release the alien on bonds "containing such conditions as the Attorney General may prescribe," or (c) to release the alien on conditional parole. See *INS v. National*

⁷ The box indicating that the juvenile does not request a hearing also contains the following statement: "I am in the United States illegally and ask that I be allowed to return to my country, which is named below." App., *infra*, 3a.

⁸ This form, like the I-770, is available in English and Spanish versions. It requires the alien to check a box admitting deportability and waiving the "right to a hearing before an Immigration Judge." In addition, the form contains boxes on which it is indicated whether the form was read by the alien or read to the alien by the officer. See App., *infra*, 5a-6a.

Center for Immigrants' Rights, 112 S. Ct. 551, 558-559 (1991).⁹ Pursuant to INS regulations, the detained alien must be advised that the decision concerning release will be made within 24 hours. 8 C.F.R. 287.3.

If INS determines to maintain custody, 8 C.F.R. 242.2¹⁰ requires that additional disclosures be made to the alien concerning his rights, and provides an opportunity for a hearing before an immigration judge. Under this regulation, INS must advise the alien of his right to be represented by legal counsel of his choice (at no expense to the government); the basis for his arrest; the conditions under which his release has been authorized; and his right to request a hearing before an immigration judge. 8 C.F.R. 242.2(c)(2).¹¹ The regulation further establishes

⁹ The statute provides:

[A]ny * * * alien taken into custody [on the basis of deportability] may, in the discretion of the Attorney General and pending [the] final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

¹⁰ Part 242 of 8 C.F.R. applies to this stage of the proceedings against an alien arrested without a warrant under 8 U.S.C. 1357, because 8 C.F.R. 287.3 provides that, upon the determination by the examining officer that deportation proceedings should be instituted, "further action in the case shall be taken as provided in part 242 of this chapter."

¹¹ This notice is provided by means of Form I-221S, which advises the juvenile whether he will be detained pending the deportation hearing and explains that he "may request the Immigration Judge to redetermine this decision." See App., *infra*, 8a. Internal procedures provide that "[w]hen

that an alien may apply to an immigration judge "for release from custody or for amelioration of the conditions under which he or she may be released" at any time after deportation proceedings are commenced and before the deportation order becomes final. 8 C.F.R. 242.2(d). The judge's determination is subject to review in the Board of Immigration Appeals, 8 C.F.R. 242.2(d), 3.1(b)(7), and then by the federal courts, 8 U.S.C. 1252(a)(1).

2. In recent years INS has confronted a growing problem—a multitude of deportable juveniles without parents or other related adults. In 1990, for example, INS took custody of 8542 juveniles pending hearings on deportability. Although INS did not then maintain nationwide records as to the number of juveniles unaccompanied by related adults, records from the Southern Region (principally South Texas) show that 73% of the 1317 juveniles detained there in 1990 were unaccompanied.¹² INS thus has been

personal delivery of an order to show cause is made by an immigration officer, the contents of the order to show cause shall be explained" and provide that "[i]f an interpreter is used for this purpose, the interpreter shall append the certification on the reverse of the order to show cause." *I & NS Investigator's Handbook* 5-3.11 (Aug. 31, 1981), App., *infra*, 9a. Furthermore, Section 545 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5062 (to be codified at 8 U.S.C. 1252b(a)(3)(A)), now requires that the form "shall be in English and Spanish."

¹² The University of Houston has conducted a statistical study of the 1259 juveniles (accompanied and unaccompanied) detained in 1989 in South Texas. See N. Rodriguez & X. Urrutia-Rojas, *Undocumented and Unaccompanied: A Mental-Health Study of Unaccompanied, Immigrant Children from Central America* (1990) [hereinafter *Undocumented Children Study*] (a copy has been lodged with the Court and

faced with a difficult problem: how to care for unaccompanied alien juveniles pending hearings on their deportability.

To deal with this problem, the Attorney General has exercised his authority to promulgate specific regulations governing the custody and release of alien juveniles arrested on deportation charges. 8 C.F.R. 242.24. Designed to "stri[k]e a balance by providing a list of appropriate custodians while maintaining the discretion of the District Director or Chief Patrol Agent to release a juvenile to an adult other than those listed individuals in unusual and compelling circumstances," 53 Fed. Reg. 17,449 (1988), the regulations generally provide for release to those individuals historically recognized as appropriate guardians under state law: adult relatives or legal guardians.

a. First, these regulations *require* the release of juveniles, "in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention," unless INS determines that detention is necessary to ensure presence at the deportation hearing or to ensure the safety of the juvenile or others. 8 C.F.R. 242.24(b)(1). Second, if none of these individuals can be located other than in INS's custody, INS will evaluate simultaneous release of the juvenile and the adult "on a discretionary case-by-case basis." 8 C.F.R. 242.24(b)(2). Third, if the parents or legal guardians are unavailable to as-

furnished to respondents). Of these juveniles, about 35% were from El Salvador, 18% from Guatemala, 17% from Honduras, and 30% from Nicaragua. See *id.* table 2. The juveniles' ages were as follows: 37% were 17 years old; 32% were 16 years old; 17% were 15 years old, and 14% were 14 or younger. See *id.* table 3.

sume custody because they are outside the United States or in INS detention, "the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit." 8 C.F.R. 242.24(b)(3).

If none of these procedures leads to release, INS "[i]n unusual and compelling circumstances and in the discretion of the district director or chief patrol agent" may release the juvenile to some other adult. 8 C.F.R. 242.24(b)(4). An unrelated adult cannot obtain custody, however, unless he "executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings." 8 C.F.R. 242.24(b)(3) and (4). INS specifically rejected the suggestion of several parties that the list of custodians to whom release routinely would be made be expanded to include "any responsible adult" because "[r]elease to others beyond [a parent, legal guardian, or adult relative] on a routine basis, would require the performance of home studies for which the Service is neither adequately funded nor qualified." 53 Fed. Reg. 17,449 (1988).¹³

b. If the juvenile is not released immediately under 8 C.F.R. 242.24(d), he does not remain in a correctional institution. Instead, INS must make "suitable placement of the juvenile in a facility designated for the occupancy of juveniles." 8 C.F.R. 242.24(c).¹⁴

¹³ Pursuant to current policy, however, INS will release a child under the "unusual circumstances" clause to a state-licensed child-care facility. See National Policy, App., *infra*, 12a.

¹⁴ Until suitable placement is found, the juvenile "may be temporarily held * * * in any INS detention facility having separate accommodations for juveniles," 8 C.F.R. 242.24(d), where the juvenile will be housed apart from unrelated adults.

Pursuant to an agreement reached at an earlier stage of this litigation, INS must within 72 hours place the juvenile in a facility that meets or exceeds the detailed standards established by the Alien Minors Shelter Care Program of the Community Relations Service, Department of Justice, 52 Fed. Reg. 15,569-15,573 (1987) [hereinafter *CRS Standards*] (reprinted in Pet. App. 152a-167a). See Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, No. 85-4544-RJK (Px) (C.D. Cal. Nov. 30, 1987) [hereinafter *Child Care Memorandum*], Pet. App. 148a-205a.¹⁵

The program is designed "to establish a network of community based shelter care programs" that will "provide a safe and appropriate environment for alien minors" during the pendency of administrative proceedings. *CRS Standards*, Pet. App. 170a. Organizations seeking to provide care under the program can provide services "through either residential, foster or group care programs," *id.* at 177a, but must meet "state licensing requirements for the provisions of shelter care, foster care, group care and related services to dependent children." *id.* at 176a.

The programs must provide not only physical custody, but family reunification services, routine and emergency medical care, comprehensive needs assess-

¹⁵ As we explained in our petition and in our Reply Brief at the petition stage, INS generally has adhered to the policies set forth in the Child Care Memorandum on a nationwide basis, even though the agreement by its terms applied only to INS's Western Region. See Pet. 7 n.8; Reply Br. 2-3. Since the petition was filed, INS has promulgated a national policy, see App., *infra*, 10a-14a, which in all important respects formalizes this practice on a nationwide basis. See Reply Br. 2-3.

ment,¹⁶ recreation,¹⁷ access to religious services, and legal assistance. See *CRS Standards*, Pet. App. 159a; *Child Care Memorandum*, Pet. App. 181a-182a. The organization providing the care must "develop an appropriate individualized service plan for the care and maintenance of each minor in accordance with his/her needs as determined in an intake assessment." *CRS Standards*, Pet. App. 157a. The providing organization also must "implement and administer a case management system which tracks and monitors [the child's] progress on a regular basis to ensure that each child receives the full range of program services in an integrated and comprehensive man-

¹⁶ In light of the conditions in the countries from which these children come, and the frequent traumatic circumstances of their travel to this country, one researcher has concluded that "at least 50% of the children" have "clinically significant levels" of Post-Traumatic Stress Disorder. See *Undocumented Children Study*, note 12, *supra*, at 58-59. If the study's conclusions are accurate, it is particularly important that the program provide comprehensive and professional care. Thus, not only are providers of the care informed that they "should schedule at least one (1) individual counseling session per week conducted by trained social work staff," *Child Care Memorandum*, Pet. App. 181a, but they also are informed that they "should anticipate many 'emergency' individual counseling sessions," *id.* at 182a.

¹⁷ The recreation plan must include "at least one hour per day of large muscle activity and one hour of structured leisure-time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days school is not in session." *Child Care Memorandum*, Pet. App. 183a. The facilities must include a recreation area with a "variety of fixed and movable equipment * * *. Examples of the variety of equipment that should be available include a basketball, volleyball, softball, tetherball, punching bag and soccer ball." *Ibid.*

ner." *Ibid.* The organization's task should be "accomplished in a manner which is sensitive to culture, native language and the complex needs of these minors." *Ibid.* Finally, the facilities are to be operated "in an open type of setting without a need for extraordinary security measures." *Child Care Memorandum*, Pet. App. 173a.

The program must include education "provided by a teacher certified by the State Department of Education," which must "concentrat[e] primarily on the development of basic academic competencies"¹⁸ and occur "in a structured classroom setting, Monday through Friday." *Child Care Memorandum*, Pet. App. 182a-183a. The facilities are required to "provide minors educational and other reading materials in Spanish," and INS officials are to "make reasonable efforts to provide minors reading materials and educational instruction in other languages as needed." *Id.* at 149a.¹⁹

3. Respondents filed this class action in 1985, claiming that INS practices with respect to detained children violate the Constitution and applicable pro-

¹⁸ The basic academic areas "should include Science, Social Studies, Math, Reading, Writing and Physical Education." *Child Care Memorandum*, Pet. App. 182a.

¹⁹ The total time period in INS-supervised custody is quite short for the great majority of the juveniles. For example, of the 199 juveniles released from INS custody in November 1991 (the last month before the petition was filed), 82% (164) had been in INS custody for less than 30 days; see also *Child Care Memorandum*, Pet. App. 178a ("[t]he length of care per child is anticipated to be approximately thirty (30) days"). Because some juveniles do remain for longer periods, the *Child Care Memorandum* requires care providers to "design programs which are able to provide a combination of short term and long term care." *Ibid.*

visions of the immigration laws. The district court certified a class of all alien juveniles detained by INS in its Western Region due to the absence of a parent or guardian. J.A. 28a-30a. After discovery, the district court granted respondents' motion for summary judgment, stating only that the ruling was based "on due process grounds" (Pet. App. 146a), and entered a permanent injunction. The order included three provisions central to this case.

First, the court invalidated the INS policy that limits release of children to unrelated adults, by requiring INS to "release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or *other responsible adult party*." Pet. App. 146a (emphasis added). Second, the court barred INS from continuing its practice of requiring persons to whom it releases children to agree that they would care for the children, but authorized INS only to "require from such persons a written promise to bring such minor before the appropriate officer or court." *Ibid.* Third, the order invalidated the INS regulations regarding review of the detention, which provide for an automatic initial examination under 8 C.F.R. 287.3, followed by a hearing before an immigration judge under 8 C.F.R. 242.2(d) upon request. The court instead decreed: "Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions upon his release. Such hearing shall be held with or without a request by or on behalf of the minor." Pet. App. 146a.

4. A divided panel of the court of appeals reversed. Pet. App. 70a-144a. Writing for two members of the panel, Chief Judge Wallace first rejected

respondents' claim that the child release policy established by 8 C.F.R. 242.24 transgressed the Attorney General's broad authority to detain arrested aliens pending deportation proceedings pursuant to 8 U.S.C. 1252(a)(1). Pet. App. 80a-93a. The majority also rejected respondents' constitutional claims.

The panel rejected respondents' substantive due process claim because the INS policies at issue were rationally related to legitimate ends of the government, such as fostering the welfare and safety of the children, Pet. App. 107a-109a. The panel concluded that a more demanding level of scrutiny was not required because the only right at stake—"the right to be released to an unrelated adult,"—could not be characterized as a "fundamental right." *Id.* at 102a-107a. The panel majority also rejected respondents' procedural due process claim and reversed the district court order requiring INS to hold mandatory hearings. *Id.* at 111a-117a. Judge Fletcher dissented. She did not question Chief Judge Wallace's statutory analysis, but concluded that INS regulations violated due process. *Id.* at 118a-144a.

5. Upon rehearing en banc, the court of appeals reversed by a 7-4 vote.²⁰ The court's opinion, like the panel dissent, did not dispute that the regulations were authorized by Congress. The court nevertheless concluded that they were unconstitutional. Pet. App. 1a-69a.

²⁰ Pursuant to Ninth Cir. R. 35-3, the en banc rehearing took place not before the full court of appeals (with 28 active judges), but before a panel consisting of the Chief Judge and 10 additional judges drawn by lot from the active judges of the court. The Ninth Circuit has not conducted a full en banc proceeding since this local rule was issued in 1980. See Arthur D. Hellman, *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* 69-70 (1990).

Judge Schroeder wrote for six members of the majority (Pet. App. 1a-25a). With respect to respondents' substantive claim, the court concluded "aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest." The court explained that this right was "secured by the Constitution in its enumerated guarantee of habeas corpus." *Id.* at 16a. Turning to the government purposes involved (*id.* at 19a-24a), the majority rebuffed INS's proffered concern for the welfare of children released to unrelated adults. First, the court reasoned that INS has no expertise in child welfare, and its decisions "in this area" are therefore "not entitled to any deference." *Id.* at 20a. Then, examining the agency's proffered concern for child welfare without deference, the court noted INS's reasoning that "since it is unable to do [an appropriate] evaluation [of proposed custodians], the best interests of the child must lie in detention rather than in release" to unrelated adults, but stated without further explanation that "[t]he Constitution requires the opposite conclusion." *Id.* at 21a. Accordingly, the court held that "INS may not determine that detention serves the best interests of [respondents] in the absence of affirmative evidence that release would place the particular child in danger of some harm." *Ibid.*

The court also accepted respondents' procedural due process claim. Judge Schroeder explained that the substantive decision discussed above—which "requires that the decision to detain be made only in conjunction with a neutral and detached determination of necessity," Pet. App. 24a—required affirmation of the procedural requirements imposed by the

district court. *Id.* at 24a-25a. The court stated that the existing procedures for a hearing before an immigration judge (see 8 C.F.R. 242.2(d)) were adequate except that (i) a hearing must be held automatically, without regard to a child's request; and (ii) the hearing must include an inquiry into whether any available unrelated adult seeking custody would represent a danger to the child. Pet. App. 25a.²¹

Chief Judge Wallace dissented, joined by Judges Wiggins, Brunetti, and Leavy. The dissent criticized the en banc majority for reasons similar to the analysis set forth in Chief Judge Wallace's original panel opinion. Pet. App. 52a-69a.

²¹ Judges Tang (Pet. App. 26a-37a) and Norris (*id.* at 37a-41a) concurred, arguing that the INS's practices do not comply with the Due Process Clause. The seventh member of the en banc majority, Judge Rymer, concurred in part and dissented in part. Pet. App. 41a-52a. Declining to address the substantive constitutional arguments, she would have affirmed portions of the district court's judgment on procedural due process grounds based on her view that the Due Process Clause requires a prompt hearing before a neutral officer. She did not adopt the majority's substantive holding that INS must make an affirmative showing of likelihood of harm to the child, but instead held simply that INS should conduct a hearing to determine whether release was appropriate under the "unusual and compelling circumstances" standard identified in the existing regulation, 8 C.F.R. 242.24(b) (4).

SUMMARY OF ARGUMENT

1. The Due Process Clause of the Fifth Amendment does not require the federal government to release unaccompanied alien juveniles to unrelated adults. Although the Court has held that the Clause has a substantive component that proscribes conduct that interferes with rights implicit in the concept of ordered liberty, that component cannot plausibly be extended to encompass a general right that would force the federal government to release juvenile aliens to unrelated adults. The customs and traditions of our Nation recognize the government's power—if not the obligation—to care for juveniles in the absence of their parents or guardians. Accordingly—even if we put to one side the federal government's plenary control over aliens—the Due Process Clause cannot be construed to impose an implied obligation that the government release juveniles to unrelated adults unwilling or unable to take the steps necessary to become guardians in accordance with readily available state-law procedures.

Similarly, the government's decision to detain the juveniles complies with the two-step analysis set forth by this Court in *Schall v. Martin*, 467 U.S. 253 (1984), and *United States v. Salerno*, 481 U.S. 739 (1987), establishing the conditions under which non-punitive detention of citizens is permissible. First, the detention furthers the government's interest in ensuring the welfare of the juveniles in its custody, which is a legitimate purpose for retaining custody consistent with fundamental fairness required by the Due Process Clause. See *Schall*, 467 U.S. at 265-268. This purpose would justify retaining custody even of juveniles who are citizens; the limited judicial inquiry appropriate in cases involving the exercise by

the political Branches of the immigration power makes it all the more clear that the detention serves a constitutionally acceptable purpose. Second, the conditions of detention are consistent with this purpose and do not suggest that detention is actually punitive in purpose. Accordingly, the detention does not deprive respondents of due process.

The court of appeals erred seriously in determining that INS's approach to this problem was "not entitled to any deference," Pet. App. 20a. Even outside the immigration context, it is well established that federal judges should not employ constitutional adjudication under the Due Process Clause as an excuse to substitute their policy judgments for the policy judgments of actors in the political Branches. The court of appeals' view that this approach was required by this Court's decision in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), is simply incorrect. *Hampton* involved a regulation that would have been unconstitutional unless it was enacted pursuant to the federal government's power over immigration and naturalization. Because it was enacted by the Civil Service Commission, without the approval of Congress, the President, or the Executive Branch agencies that implement immigration policy, the Court declined to assume the regulation represented an exercise of immigration policy. This case, by contrast, involves a policy judgment regarding aliens, by the agency duly authorized to implement policies with respect to aliens. *Hampton* is inapposite.

2. The court of appeals also erred in concluding that INS procedures do not provide due process. There is no reason to require a hearing to determine whether there is particularized evidence that adults willing to assume custody pose a risk of harm to the

juveniles, because that fact is not relevant to the agency's custody determination. As shown above, the Constitution permits the agency to enact a general substantive policy preventing release to persons other than related adults and legal guardians. Because under this rule the existence of a particularized risk is not relevant, the Due Process Clause does not require a hearing to establish whether the risk exists.

Similarly, there is no need to require automatic hearings regarding custody in the absence of a request by the juvenile. INS procedures clearly inform the juveniles of their right to a hearing and ensure that they contact responsible adults before making their decisions. If a juvenile armed with the relevant information indicates that he does not wish to have a hearing, the Due Process Clause does not require the government to provide one.

At bottom, this case turns on the court of appeals' view that INS erred in determining that juveniles are better off in government-monitored child-care facilities, specially designed to deal with the complex needs of unaccompanied alien juveniles, than they are in the custody of unrelated adults whose interest in the juveniles is insufficient to motivate them to take advantage of state-law proceedings necessary to establish status—and responsibility—as guardians. In our constitutional system, that determination is left to the political Branches, not the judicial Branch. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT REQUIRE THE FEDERAL GOVERNMENT TO RELEASE UNACCOMPANIED ALIEN JUVENILES TO UNRELATED ADULTS

The opinion of the court of appeals does not expressly rely on the Due Process Clause,²² rendering it difficult to respond precisely to its analysis. In our view, though, respondents' claim fails because the Due Process Clause contains no general substantive requirement that the federal government release juvenile aliens to unrelated adults, and because the circumstances establish that a facially legitimate and nonpunitive purpose supports the detention.

A. The Due Process Clause of the Fifth Amendment Does Not Protect a Substantive Right of Alien Juveniles To Be Released to Unrelated Adults

This Court has stated on several occasions that the Due Process Clauses of the Fifth and Fourteenth Amendments contain a "substantive component * * * that protects individual liberty against 'certain government actions regardless of the fairness of the pro-

²² The only constitutional provision on which the en banc majority relied expressly (see Pet. App. 16a) was the Habeas Corpus Clause, Art. I, § 9, Cl. 2. That Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Clause is not an independent fount of substantive constitutional rights; rather, it merely requires a procedure to test whether government detentions violate *other* substantive provisions of law. The very pendency of this lawsuit demonstrates conclusively that the Privilege itself has not been suspended; the issue before this Court is whether some other provision of the Constitution bars the detention at issue.

cedures used to implement them.'” *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).²³ The Court has explained that the proscribed actions are those that “interfer[e] with rights implicit in the concept of ordered liberty.” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations and internal quotation marks omitted). At the same time, this Court “has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this area are scarce and open-ended.” *Collins*, 112 S. Ct. at 1068.

The limited reach of substantive due process makes it clear that the Clause does not protect a substantive right to be released to an unrelated adult, particularly when the person claiming the right is an alien.²⁴ To be sure, this Court has recognized a “private realm of family life into which the state cannot enter,” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and has held that this realm is sufficiently broad to prevent the States from “mak[ing]

²³ Although most of the cases in this area have dealt with the Due Process Clause of the Fourteenth Amendment, the Court has suggested that the same analysis applies to cases arising under the Fifth Amendment. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (describing substantive due process cases as interpretations of the “Due Process Clauses of the Fifth and Fourteenth Amendments”).

²⁴ See, e.g., *Galvan v. Press*, 347 U.S. 522, 530-531 (1954) (per Frankfurter, J.) (rejecting the view that the “concept of substantive due process * * * qualifies the scope of political discretion * * * in regulating the entry and deportation of aliens,” and stating that “the Executive Branch of the Government must respect the procedural safeguards of due process” (emphasis added)).

a crime of a grandmother’s choice to live with her grandson,” *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion of Powell, J.). But these cases rest squarely on “the sancity of the family” and the indisputable fact that “the institution of the family is deeply rooted in this Nation’s history and tradition,” *id.* at 503. The plurality in *Moore* made it clear that a similar ordinance would be permissible if it “affected only *unrelated* individuals.” *Id.* at 498 (emphasis in original) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)). These decisions therefore lend no support to a constitutional rule recognizing a substantive due process right to live with unrelated persons.

Moreover, “this Nation’s history and tradition” (*Moore*, 431 U.S. at 503) provide strong support for the INS’s policies regarding the welfare of these alien minors. As this Court recognized in *Schall v. Martin*, 467 U.S. 253, 265 (1984), juveniles “are assumed to be subject to the control of * * * the State” when “parental control falters.” Consistent with this responsibility, the government has determined that juveniles should not ordinarily be released to the care of unrelated adults who are unwilling to take the steps necessary to become legal guardians under state law. It is untenable to suggest that this conduct offends “the concept of ordered liberty,” *Salerno*, 481 U.S. at 746.

B. The Government’s Interest in Ensuring the Welfare of Alien Juveniles in Its Custody Is a Facially Legitimate and Nonpunitive Purpose That Justifies Retaining Custody of the Juveniles

Although the Due Process Clause does not protect a substantive right of juveniles to be released to unrelated adults, it does prohibit deprivations of “liberty” without “due process of law,” and thus bars

the government from detaining individuals for punitive purposes in the absence of a trial, and allows detention in other contexts only to "serv[e] a legitimate regulatory purpose compatible with the fundamental fairness demanded by the Due Process Clause." See *Salerno*, 481 U.S. at 746-747; *Schall*, 467 U.S. at 268-270. Because this case presents an exercise of the discretion Congress has delegated to the Executive in "regulating the relationship between the United States and our alien visitors," *Mathews v. Diaz*, 426 U.S. 67, 81 (1976), the "special judicial deference" appropriate for policy choices in the immigration context, see *Fiallo v. Bell*, 430 U.S. 787, 793 (1977), suggests that any "facially legitimate and bona fide reason" should be sufficient, because "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the constitutionally protected interests of those adversely affected. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (discussing a First Amendment claim).²⁵

²⁵ Respondents suggest that the "plenary authority" of the political Branches with respect to immigration policy has force only in cases "involving whom to admit or exclude from the United States," and that the "method implementing [a] substantive immigration enactment [is] subject to searching review." Br. in Opp. 17 (citing *INS v. Chadha*, 462 U.S. 919, 940-941 (1983); *Landon v. Plasencia*, 459 U.S. 21, 32-37 (1982)). Neither point is correct. First, this Court's opinion in *Kleindienst* clearly establishes that the "special judicial deference" appropriate in the immigration context applies not only to Congressional policy choices, but also to the Executive's exercise of delegated power. See *Kleindienst*, 408 U.S. at 770.

Nor do this Court's decisions support the limited scope of plenary authority suggested by respondents. As the Court explained in *Diaz* (which involved a decision regarding eligibility for welfare benefits of aliens already lawfully admitted,

1. *The Government's Interest in the Welfare of Alien Juveniles in Its Custody Is a Legitimate Regulatory Purpose That Justifies Retention of Custody*

Under *Schall v. Martin*, the first step in determining whether the government lawfully may detain citizens in a pretrial context is to determine whether the "practice serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause." 467 U.S. at 268.²⁶ The

see 426 U.S. at 69), the special deference appropriate in immigration matters is tied to "the responsibility for regulating the relationship between the United States and our alien visitors," a responsibility "committed to the political branches of the Federal Government." 426 U.S. at 81. Because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and because in our society the responsibility for formulating those policies is "exclusively entrusted to the political branches of government," it makes perfect sense to say that all such policy choices should "be largely immune from judicial inquiry or interference," *Harris v. Shaughnessy*, 342 U.S. 580, 588-589 (1952); see *Diaz*, 426 U.S. at 81 ("Since decisions in these matters may implicate our relations with foreign powers, * * * such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.").

Indeed, the broad field in which this deference applies is evident from *Plasencia* itself, a case rejecting a procedural due process claim to the procedures afforded by the INS in an exclusion hearing. Even in that purely procedural context, the Court noted that "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature." 459 U.S. at 34.

²⁶ The *Salerno* Court offered a catalogue (see 481 U.S. at 748-749) of numerous instances in which this Court has found that government interests were sufficient to outweigh an individual's liberty interest.

INS reasonably determined that the custody in issue does further a legitimate regulatory purpose and that determination is entitled to judicial deference.

a. The INS retains temporary custody of unaccompanied minors for the purpose of fostering their welfare and safety until INS can locate a related adult (or legal guardian) or conclude the deportation proceedings.²⁷ This Court already has held, in *Schall*, that child welfare is a legitimate justification for pretrial custody. As the Court explained in *Schall*, the inability of juveniles to care for themselves makes it perfectly consistent with fundamental fairness to detain juveniles to further this purpose:

[J]uveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.

467 U.S. at 265 (citations and internal quotation marks omitted); see *Santosky v. Kramer*, 455 U.S. 745, 766-767 (1982) (discussing the State's *parens patriae* interest in child welfare).

In *Schall*, the Court rejected a Due Process Clause challenge to pretrial detention of juveniles because

²⁷ The *CRS Standards* published in the Federal Register make clear that concern for the welfare of minors (including family reunification) was the primary purpose for implementing this program. See Pet. App. 156a-157a ("Purpose and Scope" section), 159a, 185a-186a.

the government had determined that it was necessary to protect society from crime and to protect the child from the consequences of his inability to care for himself. There is no basis for reaching a different conclusion here.

Although INS does not contend that unaccompanied minors present a danger to the community, the *Schall* Court plainly accepted the legitimacy of governmental interests in retaining custody of children to care for them when parental control falters. See *Schall*, 467 U.S. at 265-266. The government's interest in protecting the child from harm is scarcely any less compelling than its interest in preventing the child from harming others. See also *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion of Powell, J.) (noting that constitutional guarantees are applied flexibly in cases involving children, to allow the government "to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'") (ellipses in *Bellotti* opinion) (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion of Blackmun, J.)).

b. INS determined that the most appropriate means for furthering its interest in the welfare and safety of unaccompanied minors was to house the minors in government-supervised child-care facilities until a parent or guardian could be located. For a variety of administrative reasons, INS determined that it would not be appropriate to safeguard the complex needs of these juveniles by conducting temporary guardianship hearings itself. The primary reason for this is straightforward and reasonable: INS has neither the administrative resources nor the expertise to conduct the home visits necessary to make reliable

guardianship determinations. In recognition of the States' traditional role in resolving guardianship issues,²⁸ INS adopted a policy of declining to release a child to an unrelated adult unless the adult has been appointed by the State to act as guardian. Although the Constitution would *permit* the federal government to make the policy choice to supplant state-court determinations on these issues (a policy choice Congress has made in the limited context described in 18 U.S.C. 5034, see note 30, *infra*), it cannot possibly *require* that choice. Cf. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991) (discussing the important role the States play in our federal system).

The court of appeals, though, readily concluded that this policy choice did not represent a permissible accommodation of the juveniles' interests (Pet. App. 20a-21a), relying squarely on its view that INS's policy choices in dealing with the problem of detained alien juveniles "are not entitled to any deference," *id.* at 20a. The court's overt willingness to substitute its policy judgment for the policy judgments of the political Branches cannot be squared with this Court's teaching, even outside the immigration context, that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do," *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

²⁸ The States, of course, have carefully developed procedures for determining the qualifications of unrelated adults to care for children. See, e.g., Ariz. Rev. Stat. Ann. §§ 14-5201 to 14-5212, 14-5401 to 14-5432 (1975 & Supp. 1991); Cal. Prob. Code §§ 1510-1517 (West 1991).

The apparent basis²⁹ for this novel approach to constitutional adjudication was the court of appeals' understanding of this Court's decision in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). In the court of appeals' view, *Hampton* justifies the conclusion that a court evaluating the constitutionality of a government policy is not required to give any weight to policy choices made by the political Branches if the court determines that the policy was made by an entity without expertise in the particular area. See Pet. App. 20a ("Child welfare is not an area of INS expertise and its decisions in this area are not entitled to any deference.").

This reading of *Hampton* is seriously flawed. In *Hampton*, this Court considered a Civil Service Com-

²⁹ The court also attempted to support this view by arguing that this Court's decision in *In re Gault*, 387 U.S. 1 (1967), constituted a "ruling * * * that children should be treated in a manner least restrictive of liberty." Pet. App. 20a. The court's reliance on *Gault* as support for a least-restrictive-alternative test in this context is mystifying. First, the opinion in *Gault* is expressly limited to juvenile rights at the trial stage ("[W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process."). Second, the various holdings of *Gault* do not support a least-restrictive-alternative analysis, but rather stand for the general proposition that juveniles are entitled to at least some of the procedural protections set forth in the Bill of Rights. See 387 U.S. at 31-57 (holding that juveniles are entitled to precise notice of charges against them, the right to counsel, the right to confront witnesses, and protections against self-incrimination). Finally, this Court in *Schall* considered in a much more apposite context the proper mode of analyzing government efforts to detain juveniles; it makes no sense to rely on generalized inferences from *Gault* when the *Schall* Court considered the precise area at issue in this case.

mission regulation limiting federal government employment of aliens, which would have been constitutional only if enacted pursuant to the plenary federal power over immigration and naturalization. Compare *Sugarman v. Dougall*, 413 U.S. 634 (1973) (invalidating a New York statute limiting government employment of aliens). Accordingly, in this unique context, the Court concluded that "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." 426 U.S. at 103. Because the regulation was approved neither by the Congress or the President, and because the sole business of the Civil Service Commission is to "promote the efficiency of the federal civil service," *id.* at 114, the Court was unwilling to assume that the regulation was promulgated in furtherance of the federal immigration power. The Court explained that the aliens harmed by the regulation "were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States," and that accordingly a decision to limit their liberty while here must "be made either at a comparable level of government or * * * justified by reasons which are properly the concern of [the Civil Service Commission]." *Id.* at 116.

In this case, by contrast, the decision to detain these aliens has been made by the agency in the Executive Branch responsible for day-to-day implementation of policies with respect to aliens.³⁰ It is untenable to

³⁰ Both the court of appeals (Pet. App. 21a) and respondents (Br. in Opp. 17) suggest that INS's decision to detain alien juveniles rather than release them to unrelated adults conflicts with Congressional policy regarding aliens, as set

suggest that INS's policy choice is not entitled to deference because INS in some sense is an interloper into the juvenile-welfare field. INS has not gone searching outside its proper jurisdiction for this problem. The problem has been thrust upon INS by the combination of socioeconomic conditions in Central America beyond its control—which cause huge numbers of unaccompanied alien juveniles to flee their homelands—and INS's statutory obligation to arrest aliens unlawfully in the country. INS is the only federal agency with responsibility for caring for these juveniles. Accordingly, its resolution of those policy questions is entitled to the same deference federal courts customarily grant when they consider constitutional challenges to Executive Branch policy choices. As discussed above, in the immigration context, those policy choices are "of a political character and therefore subject only to narrow judicial review," *Hamp-*

forth in 18 U.S.C. 5034 and related provisions. Section 5034, though, simply provides that federal magistrates adjudicating criminal cases involving juveniles generally should release the juveniles to related adults or to other responsible parties. That section, directed at criminal proceedings involving juveniles who are citizens of this country, is plainly inapplicable to this dispute, which involves civil deportation proceedings and alien juveniles. Congress has not adopted any similar policy with respect to deportation proceedings or alien juveniles, and has not afforded INS the resources necessary to evaluate on a case-by-case basis the ability of willing adults to provide the care that is appropriate for juveniles in this case, whose troubled backgrounds, see note 16, *supra*, and lack of familiarity with our culture make special care extraordinarily important. It is entirely reasonable for INS instead to defer to guardianship determinations made by the family courts of the States. In any event, we note that the conditions of detention established by INS more than satisfy the statutory provisions Congress provided for the detention of citizen juveniles in 18 U.S.C. 5035, 5039.

ton, 426 U.S. at 101 n.21. The court of appeals' contrary view—that it is appropriate to grant “no deference”—is wrong as a matter of law.

2. The conditions of confinement are consistent with the nonpunitive interest in furthering juvenile welfare.

Under the framework set forth in *Schall* and applied in *Salerno*, the second step in determining whether the government may detain individuals in a pretrial context is to consider the conditions of custody; the question is whether those conditions are sufficiently compatible with the articulated purpose of custody to justify the conclusion that the government's decision to retain custody actually rested on that purpose, rather than an unstated desire to inflict punishment before conviction. *Schall*, 467 U.S. at 269-274; *Salerno*, 481 U.S. at 746-748. The terms and conditions of the custody at issue in this case clearly satisfy this inquiry. As discussed above, see pages 11-13, *supra*, the Community Relations Service has implemented a detailed program designed to further every significant aspect of the child's welfare.³¹

³¹ Respondents make much (Br. in Opp. 9-15) of the unsatisfactory conditions alleged to have existed in INS facilities at earlier stages of this litigation. As we explained in our Reply Brief at the petition stage (see Reply Br. 3-4), respondents' allegations of deplorable conditions are no longer relevant, because INS entered into the consent decree described above, which sets forth detailed and comprehensive requirements regarding the conditions of detention. See *Child Care Memorandum*, Pet. App. 148a-205a. The issue in this case, rather, is whether, in light of the conditions required by that decree, the Constitution nevertheless prohibits INS from declining to release an alien juvenile to an unrelated adult who has not taken the trouble to become a legal guardian, unless INS can produce affirmative evidence of the likelihood that the adult would harm the juvenile.

The program compares favorably with the program outlined in *Schall*, 467 U.S. at 270-271. INS has developed this program to implement the articulated concern for the safety and welfare of detained alien juveniles (see note 27, *supra*), and the court of appeals agreed that INS's policy does not reflect an intent to punish the detained juveniles, Pet. App. 19a (“Whatever purposes detention serves, they do not relate to punishment.”). Accordingly, the program is constitutional under the test outlined in *Schall* and *Salerno*.

II. THE EXISTING PROCEDURES PROVIDE THE PROCESS THAT IS DUE UNDER THE FIFTH AMENDMENT.

The court of appeals also ruled that the procedures afforded the detained juveniles must be altered in two respects in order to provide due process: (1) the hearing before the immigration judge to review INS's determination that detention is appropriate must include an inquiry into whether any available unrelated adult would represent a danger to the child; and (2) the hearing must be held automatically, even if the juvenile does not request it. See Pet. App. 25a. That ruling is incorrect. To the contrary, the existing procedures established by INS would provide the requisite process under the Fifth Amendment even if respondents were citizens.

1. As described above (pages 3-8, *supra*), an alien arrested pursuant to 8 U.S.C. 1357(a)(2) must “be taken without unnecessary delay for examination before an officer of the [Immigration and Naturalization] Service” to be examined as to his right to enter or remain in the country. INS regulations require that the proceedings take place “promptly, and in

any event within 24 hours," 8 C.F.R. 287.3, unless the individual seeks and is granted voluntary departure from this country. See 8 C.F.R. 242.5, 242.24(g). Before the juvenile makes any choices about his custody, with rare exceptions³² he "must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list." 8 C.F.R. 242.24(g).

If the juvenile does not seek voluntary departure, the government at the examining hearing must establish a prima facie case of deportability, thus meeting a standard even higher than the probable cause standard required to justify detention of pretrial detainees in criminal proceedings. See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). The juvenile is advised specifically in a language he understands (see 8 C.F.R. 242.24(h)) of the right to seek a hearing before an immigration judge under 8 C.F.R. 242.2(d), at which the juvenile may seek "release from custody or * * * amelioration of the conditions under which he or she may be released." The juvenile will receive such a hearing unless he declines to check a box marked "[I] do request a redetermination by an Immigration Judge of the custody decision." See App., *infra*, 8a (reprinting Form I-221S).

2. The court of appeals' first requirement—that the hearing include an inquiry into whether any unrelated adult willing to accept custody of the juvenile poses an affirmative risk of harm to the juvenile—rests on a misunderstanding of the substantive decision to be made. As we have shown in Point I, the Constitution permits the federal government, as a general matter, to decline to release alien juveniles

³² The rules for Mexican and Canadian juveniles are slightly different. See note 4, *supra*.

in its custody to unrelated adults, based on the policy judgment that it is generally inappropriate for juveniles to be placed in the care of unrelated adults unless those adults are willing to accept the responsibility of becoming guardians of the juveniles.

Accordingly, the only relevant facts necessary to justify the detention are that the individuals are alien juveniles, and that there are no related adults or legal guardians available to accept custody. Because 8 C.F.R. 242.24(b) requires INS to determine these facts before detaining the juvenile, and because the hearing provided under 8 C.F.R. 287.3 allows the immigration judge to review INS's determination of these facts, no further factfinding is appropriate. In short, there is no basis for a hearing to determine whether the government could prove a particularized risk from release in each case, because the existence of a particularized risk is irrelevant to the required determination. See *Michael H. v. Gerald D.*, 491 U.S. 110, 126 (1989) (plurality opinion of Scalia, J.) ("It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration."); *id.* at 132-133 (Stevens, J., concurring) (agreeing with this proposition).

The court of appeals erred in relying heavily on *Schall v. Martin*, *supra*, for its proposition that an individualized hearing is required in each case. The State justified detention in *Schall* by reference to the likelihood that the juvenile was reasonably likely to commit crimes that would harm others or the child. To satisfy that justification, the process had to be designed to detain only those children reasonably likely to commit crimes. Thus, the Constitution required hearings to determine whether the children

were reasonably likely to commit crimes. By contrast, detention is justified here by the absence of related adults to whom the child may be released. As discussed above, INS procedures require it to make that factual determination in order to retain custody of the minor and afford an opportunity for a hearing before an immigration judge to review that finding if the juvenile believes INS has erred.

3. The court of appeals' second requirement—that INS automatically hold redetermination hearings under 8 C.F.R. 287.3, even if the juvenile does not request such a hearing—is equally inappropriate. As discussed above, the regulations put the juvenile in contact with a responsible adult who is not affiliated with the government. The regulations entitle the juvenile to a full administrative hearing before an immigration judge at any time if he wishes to challenge the government's decision to retain custody. Moreover, the juvenile can choose to forego such a hearing only by declining to check a box that expressly states: “[I] do request a redetermination by an Immigration Judge of the custody decision.” See App., *infra*, 8a (reprinting Form I-221S). These procedures are constitutionally satisfactory.

In light of this Court's holding that a juvenile has the capacity to waive his *Miranda* rights in criminal proceedings, see *Fare v. Michael C.*, 442 U.S. 707, 726-727 (1979), it also must be true that a juvenile can waive the much less significant right to a redetermination of his custody status in a deportation proceeding. A deportation proceeding “is a purely civil action to determine eligibility to remain in this country,” *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); see also *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975) (suggesting that its holding would not

apply in civil cases because it was limited to the “wholly different context of the criminal justice system”).

Moreover, the balance of interests readily supports the INS's conclusion that a second mandatory hearing is not necessary in every case. The “private interest at stake,” see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)—whether the juvenile will be detained pending the deportation proceedings—does bear some significance, and this interest is weighty. On the other hand, the “risk of an erroneous deprivation,” see *ibid.*, is quite small in these circumstances. The juvenile has an unconstrained right to a hearing on request, and the limited facts on which the detention properly can rest—whether the alien is a juvenile, whether there are any related adults or legal guardians available to take custody, and whether the alien appears to be in this country lawfully—can be determined reliably without a full-blown adversarial hearing. Finally, the “fiscal and administrative burdens,” see *ibid.*, of having a hearing even when the alien has not requested it—however clear and undisputed the facts may be—are substantial. In these circumstances, INS provides all the process that is due when it puts the juvenile in possession of accurate information regarding his rights, ensures that he contacts a responsible adult not affiliated with the government, and provides an unconstrained opportunity to a hearing upon request.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

INSTRUCTIONS TO OFFICERS

This advisal is required to be given to all persons who are taken into custody and who appear, are known, or claim to be under the age of eighteen and who are not accompanied by one of their natural or lawful parents. No such person can be offered or permitted to depart voluntarily from the United States except after having been given this notice.

The required procedure distinguishes between two classes of minors.

1) The first class are those minors apprehended in the immediate vicinity of the border and who permanently reside in Canada or Mexico. These persons shall be informed that they have a right to make a telephone call to any of the persons mentioned in the notice. The purpose of this call is so that they can seek advice as to whether they should voluntarily depart or whether they should request a deportation hearing. We are required to make a record of any refusal to accept our offer of a telephone call.

2) As to all other minors, *they must not only be given access to a telephone, they must establish communication, telephonic or otherwise, with one of the persons listed in the notice before they can be offered voluntary departure.*

Officers are not to offer any advise to any minor as to what he/she should or should not do.

The INS retains the right to decide when to allow telephone calls. The only prohibition is that the minor cannot be asked to voluntarily depart until after telephone access is provided. If the minor is not offered voluntary departure but is put into deportation proceedings by issuance of an Order to Show Cause, this procedure is not necessary. It is our duty to make reasonable efforts to contact the person of the minor's choice, but after unsuccessful efforts to reach that person, we can facilitate contact with another such person. Whenever the minor elects to pursue a process, such as a call to a foreign country, which is operationally unacceptable, we can always proceed to issue an Order to Show Cause.

The minor must tell the type of person that he/she talked to but need not give us that person's name or identifying information. If a minor, *of his/her own volition*, asks to contact a consular officer, this will satisfy the requirements of the notice.

The officer need not read the notice to the minor unless the minor is under 14 year of age, or unable to understand the notice. The officer must ask the minor whether he/she wanted to make a call, whether a communication was made and, if made, to whom. The officer must also verify whether the minor wanted voluntary departure or a hearing, and must sign and date the form to show this was done.

To be completed by the Officer:

I verify that;

- 1.a. ☐ The subject named was given this notice to read.
b. ☐ I read this notice to the name subject in the following language: _____
- 2.a. ☐ I asked this subject whether he/she wanted to make a telephone call, and offered assistance in the use of the telephone.
- 3.a. ☐ The subject told me that he/she did not want to make a telephone call, or
b. ☐ The subject told me that he/she established communication and the form was marked to indicate it;
c. ☐ The subject was unable to establish telephone communication with the desired individual. The following number of attempts were made: _____
- 4.a. ☐ The subject requested a hearing.
b. ☐ The subject admitted deportability and requested to return to his/her country voluntarily, without a hearing.
- 5.a. ☐ An order to show cause was issued because, the subject was unable to establish contact with any of the individuals specified after making the number of attempts indicated above (Item 3 c), and after assistance to establish contact was given or offered.

Signature of Officer

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Rights and Request for Disposition

Alien's Name: _____

A Number (if any): _____

A - _____

Your Rights.

You have been arrested because Immigration Agents believe that you are illegally in the United States. When you are arrested in the United States you have certain rights. No one can take these rights away from you. This paper explains your rights.

You have the right to use the telephone.

You may call your mother or father or any other adult relative. You may call your adult friend. If you do not know how to use a telephone, the immigration agent will help you.

You have the right to be represented by a lawyer.

Attached to this paper is a list of lawyers who can talk to you, and help you, for free. A lawyer can fully explain all of your rights to you, and can represent you at a hearing.

You have a right to a hearing before a judge.

The judge will decide whether you must leave or whether you may stay in the United States. If for any reason you do not want to go back to your country, or if you have any fears of returning, you should ask for a hearing before a judge. If you do not want to have a hearing before a judge, you may choose to go back to your country without a hearing.

Reading this Notice:

- ☐ I have read this notice.
☐ This notice has been read to me.

Right to Use Telephone:

- ☐ I have contacted my parent(s) or a legal guardian by telephone.
☐ I have contacted an adult friend or relative by telephone.
☐ I do not want to talk to anyone by telephone.

Right to be Represented by a Lawyer:

- ☐ I have spoken with a lawyer.
☐ I do not want to speak with a lawyer.

Right to a Hearing:

- ☐ I understand my right to a hearing before a judge.

- ☐ I request a hearing before a judge.

Signature: _____

Date: _____

Completion of the following is optional:

The person contacted is: (Relationship) _____

The person contacted is: (Name) _____

- ☐ I do not want to have a hearing before a judge.

I am in the United States illegally and ask that I be allowed to return to my country, which is named below.

Signature: _____

Country: _____

Date: _____

Nombre del extranjero:

Número del extranjero:

A -

Sus Derechos.

Usted ha sido arrestado porque Agentes del Servicio de Inmigración creen que usted está ilegalmente en los Estados Unidos. Al ser arrestado usted tiene ciertos derechos. Nadie puede quitarle estos derechos. Este documento le explica sus derechos.

Usted Tiene el Derecho de usar el Teléfono.

Usted puede llamar a su madre o padre o otro pariente. Usted puede llamar a un amigo adulto. Si usted no sabe usar el teléfono, el agente del Servicio de Inmigración le ayudará.

Usted tiene el Derecho de ser Representado Por Un Abogado.

Sin costo alguno, adjunto a este documento, se encuentran los nombres de abogados que pueden hablar con usted y ayudarlo. El abogado le puede explicar todos sus derechos y puede representarle en una audiencia.

Usted Tiene el Derecho a Una Audiencia ante el Juez de Inmigración.

El juez decidirá si usted debe salir o si usted puede quedarse en los Estados Unidos. Si por alguna razón usted no desea regresar a su país, usted puede pedir una audiencia ante el Juez de Inmigración.

Si usted no desea una audiencia, usted puede regresar a su país.

Leyendo este aviso:

- ☐ He leído este aviso.
☐ Este aviso ha sido leído a mí.

Derecho de Usar el Teléfono:

- ☐ Me he comunicado con mis padres o guardian legal.
☐ Me he comunicado con un amigo adulto o pariente.
☐ Yo no deseo hablar con nadie por teléfono.

Derecho de ser Representado por un Abogado:

- ☐ He hablado con un abogado.
☐ No deseo hablar con un abogado.

Derecho a una Audiencia:

- ☐ Yo entiendo mi derecho a una audiencia ante al Juez de Inmigración.

- ☐ Yo deseo una audiencia ante el juez.

Firma: _____

Fecha: _____

Completar lo siguiente es opcional:

Parentesco de la persona a quien usted llamó.

Nombre de la persona a quien usted llamó.

- ☐ Yo no deseo una audiencia ante el juez.

Yo estoy en los Estados Unidos ilegalmente y deseo regresar a mi país.

Firma: _____

Nación: _____

Fecha: _____

Name of Alien _____

A-

Notice

You are being detained by an Officer of the Immigration and Naturalization Service, because you are an alien who is in the United States illegally. This notice describes those options available to you. You must sign below to show that you have received a copy of this notice and understand it. Please read this notice carefully before deciding what you wish to do.

1. Right to a Deportation Hearing

You have the right to a deportation hearing to determine whether you may remain in the United States. If you request a deportation hearing, you may be represented at the hearing by counsel at no expense to the government of the United States. To insure your presence at your hearing you may be detained unless you are able to post a sum of money which you will lose if you do not appear. If you appear at all required hearings and other requests for appearance, your money will be returned.

2. Opportunity for Voluntary Departure

If you want to return to your home country, you may ask to be allowed to depart on the first available transportation. If your request is granted you will give up your opportunity for a deportation hearing and your opportunity to apply for other relief. If you change your mind at any time before you actually go home you will be given a deportation hearing.

3. Representation by Counsel

You may be represented by counsel of your choice at no expense to the Government of the United States. If you wish legal advice and cannot afford it, you may ask for a list of available free legal services. You may contact counsel at this time or at any time prior to your departure from the United States.

4. Communication with Consul

You may talk to the consular or diplomatic officers of your country or nationality.

Request for Disposition

I acknowledge that I have received a copy of the above notice and understand it.

I understand my options and I request one of the following dispositions of my case. I understand that if the Government pays for my transportation out of the United States, I cannot return for five years unless I first obtain permission from the Attorney General.

1. I wish to request a hearing before an Immigration Judge to determine whether I may remain in, or will be deported from the United States.

Date and Time: _____

Signature _____

Witness _____

2. I admit that I am in the United States illegally. I wish to give up my right to a hearing before an Immigration Judge and return to my home country on the first available transportation. I understand that I may be held in detention until my departure.

Date and Time: _____

Signature _____

Witness _____

☐ Form read to alien by officer.

☐ Form read by alien.

Remove at expense of: ☐ Government - Cost \$ _____ Request for voluntary departure approved:

☐ Alien - Cost \$ _____

Signature and Title _____

Date _____

A-

Nombre del extranjero _____

Aviso

Usted está detenido por un oficial del Servicio de Inmigración y Naturalización porque Usted es un extranjero que está en los Estados Unidos ilegalmente. Este aviso describe las opciones que usted tiene a su disposición. Es necesario que firme abajo para mostrar que Usted ha recibido una copia de este aviso y que lo comprende. Favor de leer el aviso cuidadosamente antes de decidir lo que desea hacer.

1. Derecho a una Audiencia de Deportación

Usted tiene el derecho de tener una audiencia de deportación para determinar si Usted puede permanecer en los Estados Unidos. Si pide una audiencia de deportación, Usted puede ser representado en la audiencia por consejero sin coste al Gobierno de Los Estados Unidos. Para asegurar su presencia a la audiencia, Usted puede ser detenido a menos que pueda poner una cantidad de dinero que perderá si no se presenta. Si se presenta a todas las audiencias necesarias, se le devolverá todo el dinero.

2. Oportunidad de Salida Voluntaria

Si desea regresar a su país, puede pedir que le permitan salir en el primer modo de transporte. Si le conceden su petición, Usted renuncia la oportunidad de tener una audiencia de deportación y su oportunidad de solicitar otro beneficio. Si desea cambiar su decisión en cualquier momento antes de partir para su país, se le concederá una audiencia de deportación.

3. Representación por Consejero

Usted puede ser representado por un consejero de su preferencia sin coste al Gobierno de Los Estados Unidos. Si desea consejo legal y no tiene los medios para pagarle a un consejero, puede pedir una lista de servicios legales gratis al público. Usted puede comunicarse con su consejero ahora o en cualquier momento antes de su salida de los Estados Unidos.

4. Comunicación con el Cónsul

Usted puede hablar con los oficiales del cónsul y oficiales diplomáticos de su país o nacionalidad.

Petición de Disposición

Reconozco que he recibido una copia del aviso antenominado y que lo comprendo.

Comprendo mis derechos y solicito una de las siguientes disposiciones en mi caso. Comprendo que si el gobierno paga por mi viaje de salida de los Estados Unidos, no podré regresar por cinco años a menos que primero obtenga permiso del Procurador General.

1. Deseo pedir una audiencia ante el Juez de Inmigración para determinar si puedo permanecer en los Estados Unidos o ser deportado.

Fecha y hora: _____

Firma _____

Testigo _____

2. Admito que estoy en los Estados Unidos ilegalmente. Deseo renunciar mi derecho a una audiencia ante el Juez de Inmigración y regresar a mi país en el primer modo de transporte disponible. Comprendo que puedo estar detenido hasta el momento de mi partida.

Fecha y hora: _____

Firma _____

Testigo _____

☐ El aviso se le fue leído al extranjero por el oficial.

☐ El aviso fue leído por el extranjero.

Remove at expense of: ☐ Government - Cost \$ _____ Request for voluntary departure approved:

☐ Alien - Cost \$ _____

Signature and Title _____

Date _____

9a

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service No.
ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

File No. _____

In the Matter of

Respondent.

Address (number, street, city, state, and ZIP code) _____

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of _____ and a citizen of _____;
3. You entered the United States at _____ on
or about _____; (date)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at _____

on _____ at _____ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated:

(signature and title of issuing officer)

(City and State)

NOTICE TO RESPONDENT

**ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS
THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION
WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE
CARRIED WITH YOU AT ALL TIMES**

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

☐ Detained in the custody of this Service. ☐ Released on recognizance.

☐ Released under bond in the amount of \$ _____.

You may request the Immigration Judge to redetermine this decision.

☐ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

(signature of respondent) _____ (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent) _____ (date)

CERTIFICATE OF SERVICE

Served by me at _____ on _____ 19__ at _____ m.

(signature and title of employee or officer)

TM 89

5-3.11

August 31, 1981

I & NS INVESTIGATOR'S HANDBOOK

* * * *

Warning of Rights

When personal delivery of an order to show cause is made by an immigration officer, the contents of the order to show cause shall be explained and the respondent shall be advised that any statements he makes may be used against him in subsequent proceedings. Aliens shall also be advised of their rights to representation by counsel of their own choice at no expense to the Government. They shall also be advised of the availability of free legal services programs and organizations recognized pursuant to 8 CFR 292.2 located in the district where their deportation hearings will be held. They shall be furnished with a list of such programs, and with a copy of I-618, "Written Notice of Appeal Rights", regardless of the manner in which the service of the order to show cause was accomplished. Service of these documents shall be noted on Form I-213. If an interpreter is used for this purpose, the interpreter shall append the certification on the reverse of the order to show cause.

* * * *

MEMORANDUM

[SEAL]

Subject

Date Dec. 13, 1991

National Policy Regarding Detention and Release of Unaccompanied Alien Minors

To

**Regional Operations Liaison Officers
District Directors
Chief Patrol Agents**

From

Office of the Commissioner

The purpose of this memorandum is to standardize the procedures nationwide regarding the detention, release, and treatment of unaccompanied alien minors in INS custody. This memorandum should be distributed to all INS field personnel.

The policy of the Immigration and Naturalization Service (INS) regarding the detention and release of unaccompanied alien minors is as follows:

1) All alien minors¹ apprehended by INS or turned over to the custody of INS by state or local law enforcement agencies are to be processed for deportation or voluntary departure in accordance with 8 C.F.R. § 242.24(g) and (h).

2) While awaiting processing, alien minors may be held by INS authorities in INS detention facilities

¹ An alien minor is defined as a male or female foreign national, under 18 years of age, who is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act (Act) or has an application for asylum pending before the INS.

having separate accommodations for juveniles or, if such accommodations are unavailable, in suitable state or county juvenile detention facilities.²

3) No alien minor may be held in a detention facility, whether an INS facility or otherwise, longer than 72 hours unless the alien minor:

- a) is charged with or convicted of a criminal offense, other than entry without inspection;
- b) is adjudicated a delinquent, or is the subject of a pending delinquency proceeding;
- c) has engaged in violent or extremely disruptive conduct which requires that he or she be held in a secure facility for the safety of himself or herself and/or others;
- d) is an escapee from another facility;
- e) is an unrepresented Salvadoran and an alternative placement is unavailable in the district where the juvenile came into INS custody (in which case the alien minor may not be transferred from the district for at least seven days); or
- f) cannot be moved for other extraordinary and compelling reasons. In this case, permission from the Juvenile Coordinator or Assistant Commis-

² A suitable juvenile detention facility is defined as a secure facility designated for the occupancy of juveniles. Juveniles charged with delinquent acts are held in these facilities for a temporary period while awaiting adjudication of their court cases. Every effort must be taken to ensure that the safety and well-being of the alien minors detained in these facilities are satisfactorily provided for by the detention staff at the juvenile detention facilities.

sioner for Detention and Deportation must be obtained before detaining the alien minor for longer than 72 hours.

4) Except for (3) above, an alien minor shall be released from INS custody, in the following order of preference, to:

- a) A parent, legal guardian, or adult relative (brother, sister, aunt, uncle, grandparent);
- b) A responsible adult designated by the parent or legal guardian in a sworn affidavit;
- c) A licensed child-care facility³ including a foster home, group home, temporary boarding home, or facility for the housing of neglected, abused, or emotionally disturbed children.

5) Before an alien minor may be released from INS custody, the person or facility assuming custody must execute an agreement to:

- a). provide for the alien minor's physical, mental, and financial well-being;
- b) ensure the alien minor's presence at all future proceedings before the INS or immigration judge;
- c) notify INS of any changes in address of the alien minor; and

³ A child-care facility is defined as a facility that provides care, training, education, custody, treatment, or supervision for a minor who is not related by blood, marriage, or adoption to the owner or operator of the facility, whether or not the facility is operated for profit. Licensed means approved by the appropriate state agency. An INS detention facility or a state or county juvenile detention facility is *not* a child-care facility under this definition.

d) not transfer custody of the minor to another person or facility without prior written permission of the District Director or chief patrol agent.

6) INS shall assist, without undue delay, with transportation arrangements to the INS office nearest to the location of the person or child-care facility to whom the alien minor is to be released.

7) INS may require the posting of a bond to ensure the presence of the alien minor at all future immigration proceedings.

8) If the alien minor cannot be released as set forth in paragraphs (4) and (5) above within 72 hours, INS shall place the alien minor temporarily in an INS-contracted group or foster home until such time as release in accordance with paragraphs (4) and (5) can be effected or until the conclusion of the immigration proceedings, whichever is earlier. The unavailability of an INS-contracted child-care facility within the jurisdiction of the INS district sector in which the alien is being held does not justify detention for more than 72 hours in a juvenile or adult detention facility, except in extraordinary and compelling circumstances and with the permission of the Juvenile Coordinator or Assistant Commissioner for Detention and Deportation.

9) An alien minor should be transferred from one child-care facility to another only in the most compelling circumstances. The alien minor should be transferred with all his possessions and his legal papers. No minor who is represented by counsel in an INS proceeding shall be transferred without advance notice to such counsel, nor shall any minor be denied access to legal services at the location to which he or she is transferred.

10) The 72 hour limit for detention of alien minors commences when INS assumes custody of the juvenile.

11) The Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation shall maintain an up-to-date record of all alien minors in INS custody. Statistical information shall be collected weekly from all INS District Offices.

Any questions regarding this national policy should be directed to Mary Ruth Calhoun, Juvenile Coordinator, HQDDP, at FTS 368-4120 or Patricia B. Feeney, Assistant General Counsel, HQCOU, at FTS 368-2895.

/s/ Gene McNary
 GENE MCNARY
 Commissioner

JUN 29 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

**WILLIAM P. BARR, Attorney General of the
United States, et al.,**
Petitioners,

vs.

JENNY LISETTE FLORES, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the INS's interest in refusing to evaluate the suitability of available custodians to care for a given minor justifies indefinitely abridging that minor's liberty interest in freedom from physical restraint.
2. Whether the automatic, indefinite detention of children denies them due process of law in violation of the Fifth Amendment to the United States Constitution because such detention is never determined to be in a given child's best interests or to further any other substantial governmental interest.
3. Whether automatic, indefinite detention of children solely to promote child welfare violates the Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-905

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL. RESPONDENTS

*On Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit*

BRIEF FOR THE RESPONDENTS

STATEMENT

1. This case asks the Court to decide whether, under the statutes and Constitution of the United States, a child may be incarcerated as a matter of course in order to save an administrative agency from deciding whether detention actually serves any important interest.

Established child welfare standards—including those prescribed by Congress and state governments for the release of minors—unanimously declare that

minors should not be held in custody unless detention is determined necessary to protect a given child or the community, and for years petitioner Immigration and Naturalization Service (INS) released minors under such a policy with unblemished success.

Since 1984, however, the agency has sought to incarcerate all children *automatically* until and unless a close blood relative comes for them. The agency refuses any effort to determine whether a child may be released safely to other responsible adults, preferring to incarcerate children indefinitely without ever considering the actual need to do so or having that detention reviewed by anyone, much less a neutral decisionmaker.

The INS defends this approach solely on the ground that routine, open-ended detention somehow "protects" children. The agency admits that its policy has nothing to do with ensuring minors' availability for deportation proceedings or with any other purpose related to the admission or expulsion of aliens. The district court's order does nothing to impair the Immigration and Nationality Act or any policy regulating immigration. Neither the holding nor the rationale of the courts below allows a greater number of persons into this country or otherwise affects the Government's authority to determine the circumstances under which persons are admitted, excluded, or deported.

Importantly, the district court's order only protects children from *unnecessary* detention. The district court did *not* mandate release of any juvenile who is a flight risk, nor did it bar the INS from refusing to release a child it reasonably determines should remain in custody to protect the public or the minor. The policies and procedures used to implement the court's brief order were left entirely to the INS.

The INS answers that it lacks the resources and expertise to determine whether a child should or

should not be detained so it "errs" on the side of incarceration. This, however, is a constitutionally insufficient reason for the open-ended impairment of physical liberty. In any event the uncontroverted record shows that for years prior to 1984, and for nearly four years since the district court's order, the INS has released hundreds of minors to custodians not on the agency's approved list, and it has done so with not a single reported instance of abuse or neglect. In short, but for the district court's order the INS would have locked up hundreds of children while actually protecting none.

2. Pursuant to 8 U.S.C. § 1252, INS agents regularly arrest and detain minors for civil proceedings upon probable cause to believe they are present in the U.S. in violation of the INA. If not released on bond, they are confined until proceedings to determine their deportability are completed, a process that may take years. 2 Clerk's Record 10 ("CR").

INS practice until September, 1984, was to release minors on bond to their parents or other responsible adults who would care for them and assure their presence at future proceedings. 88 CR 72; 163 CR 1191; 162 CR 915; 163 CR 1201, 1207, 1213. This policy was consistent with well-established federal and local standards on the detention of minors, and no evidence indicates that it either was a burden on the agency or resulted in harm to any children. On September 6, 1984, then-INS Regional Commissioner Harold Ezell ended this practice in the Western Region with the following memorandum:

No minor shall be released except to a parent or lawful guardian. This is necessary to assure that the minor's welfare and safety is [sic] maintained and that the agency is protected against possible legal liability.

District Directors and Chief Patrol Agents are authorized, *in unusual and extraordinary cases*, to release a minor to a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child.

3 CR 41 (emphasis supplied).

The INS's memorandum all but eliminated the discretion local officials had previously exercised to release minors. Not surprisingly, INS field officers simply *stopped* releasing children to anyone but a parent or guardian. *E.g.*, 161 CR 870-71.¹ Unlike its former procedure, the INS now refused to determine whether detention would actually be in a child's best interests. Nor did the agency provide procedures by which its initial, automatic detention orders could be regularly reviewed.²

For boys and girls without a close blood relative to come for them, the INS's blanket detention policy and post-detention procedural void meant certain incarceration. As a practical matter, few children have any real chance of obtaining a guardian: apart from being physically confined, children undergoing INS proceedings are entitled to neither guardians *ad litem* nor court-appointed counsel. Few are able to

afford retained counsel. The Los Angeles Superior Court has flatly declared children in INS detention *ineligible* for temporary guardians. J.App. at 27. Denied guardians, children have no option but to remain in INS jails. Under the new policy, children began spending up to a year in INS detention facilities. 160 CR 400.

On July 11, 1985 15-year-old Jenny Flores, 16-year-old Dominga Hernandez, 13-year-old Alma Cruz, and 16-year-old Ana Martinez, filed suit on behalf of themselves and all other children jailed solely because INS refused to release them to available responsible adults or relatives. 1 CR 4-5.³

Some two years later, the district court held that the INS's detention policy denied equal protection because the agency released minors in exclusion proceedings, but not in deportation proceedings, to their adult brothers, sisters, aunts and uncles, as well their parents and guardians.⁴

Despite this order, many children continued to endure indefinite detention because the INS refused to evaluate whether extended family members, adults who were not blood relatives, or even licensed

¹ Releasing minors needing medical care was, in fact, the *only* actual use of the "unusual and extraordinary" exception the agency ever managed to identify. Joint Appendix ("J.App.") at 7.

² Although INS regulations provide that evidence must be presented to an INS district director or designated subordinate "for a determination as to whether there is *prima facie* evidence" that a prisoner is deportable, 8 C.F.R. § 287.3, the INS has *no* procedure—whether before a district director, immigration judge, or anyone else—whereby *the cause for detaining* a child must be reviewed. The agency even lacks procedures by which to give children notice of the purportedly "protective" restrictions on their release. J.App. at 11.

³ On July 19, 1985 Jenny and Dominga, still in jail because of the INS's newly restrictive policy, asked Senior District Judge Robert J. Kelleher to order their release. 5 CR. Judge Kelleher ordered the INS to free them to available responsible custodians. 10 CR.

⁴ Remarkably, given its ostensible purpose, the INS's 1984 policy change did not apply to all children. The agency began applying a blanket detention policy only toward children arrested for *deportation* proceedings, while continuing to release minors undergoing *exclusion* proceedings to brothers, sisters, aunts and uncles as well. 8 C.F.R. § 212.5(a)(2)(ii) (1987). The district court reasoned there was no valid reason to deny children undergoing deportation proceedings similar treatment and ordered the INS to begin releasing all minors in accordance with its treatment of those in exclusion proceedings. 188 CR.

juvenile shelters were fit to care for them. On May 16, 1988, respondent children moved to require the INS to *resume* determining whether open-ended detention was reasonably necessary. The INS urged the court to delay ruling until new regulations governing the release of minors were issued, and the court agreed. CR 252.

The new regulations, however, continued the INS's policy of blanket detention. The only meaningful change was to add grandparents to the list of relatives to whom minors could be released. The regulations did not so much as permit release to licensed juvenile shelters or extended family members. There remained no relief for children who had no close blood relative in the United States willing to come for them.⁵ Having considered the case for almost three years, the district court held that this policy denied children due process of law. 256 CR. The district court ordered INS to consider the release of children on an individualized basis, and left it to the agency to adopt the procedures it would follow in determining when release is warranted. The Ninth Circuit Court of Appeals, sitting *en banc*, affirmed. The facts compelling the district court's judgment and the court of appeals' affirmance are wholly uncontroverted.

a. For the first time in its history, the INS sought to exercise its detention authority for purposes having nothing to do with the Immigration and Nationality Act ("INA" or "Act"). Rather, its juvenile detention policy was promulgated strictly to promote *child welfare*. The INS stressed that the sole purpose for

⁵ Two of the four class representatives, including one freed by Judge Kelleher, Dominga Hernandez, would still have been jailed under the "new" regulations.

routinely confining children was to protect them and had nothing to do with ensuring their availability for deportation. J.App. at 11.⁶

b. Although it now assumes to protect children, the INS admits having no expertise in child welfare and that it failed to consult with anyone possessing such knowledge before changing its policy. 76 CR 56-57. The INS never assessed what impact the blanket detention policy would have on the time children spent in INS jails. J.App. at 9.

c. Nor was the change to a blanket detention policy motivated by any actual problem the INS had experienced under its prior policy. During the many years the INS had released children to responsible, if unrelated, adults, there was no reported case in which any minor had been harmed or neglected. J.App. at 9-10, 21-22.

The INS finally admitted having *no* evidence to support its notion that juveniles released to parents are less likely to be harmed or neglected than those released to other adults or child welfare organizations. The INS merely "*presume[d]*" that harm or neglect will be less likely if a minor is in the custody of a person such as a parent or legal guardian ..." J.App. at 15 (emphasis supplied).

d. In contrast to the INS's approach, *all* recognized juvenile justice standards—those promulgated by the American Bar Association, the National Advisory Committee for Juvenile Justice and Delinquency Prevention, the National Conference of

⁶ The INS later admitted having *no* evidence that children released to close adult relatives are any more likely to appear for deportation than are minors released to other adults. 159 CR 39.

Commissioners on Uniform State Laws, the National Advisory Commission on Criminal Justice Standards and Goals, and the U.S. Department of Health, Education and Welfare, among others⁷—provide that children should only be detained upon a reasoned determination that confinement is strictly necessary. J.App. at 34 *et seq.* Congress, too, joins this consensus, mandating that federal magistrates release minors whenever possible to reputable adults regardless of blood relationship. 18 U.S.C. § 5034 reprinted in J.App. at 6.

Modern child welfare practices recognize that routinely institutionalizing children endangers their mental health and progress toward productive adulthood. Long experience has verified the damage detention works upon children's ability to form close personal relationships, upon their social maturity, performance on intelligence and developmental tests, ability to function in non-institutional settings, and self-concept. North American Council on Adoptable Children, Research Brief #1, *Challenges to Child Welfare, Countering the Call for a Return to Orphanages* (November 1990) at 8-12; M. Wald, *et al.*, *Protecting Abused/Neglected Children, A Comparison of Home and Foster Placement* (Stanford Center for the Study of Youth Development, Stanford University, November 1985) at 10. At best, detention

creates "needless idleness, boredom, acute anxiety, fear, depression, and hostility. Idle, unattended confined children present special supervisory problems. They frequently become destructive and cause physical harm to each other, or their surroundings." *D.B. v. Tewksbury*, 545 F.Supp. 896, 904 (D. Ore. 1982).

e. The INS justifies its violation of sound child welfare practices by professing a lack of resources and expertise to determine whether an available adult is a fit custodian. As has been seen, however, until 1984 the INS routinely determined whether minors should be released to extended family members or other available custodians. *E.g.*, J.App. at 18 (Baltimore, policy to release juveniles to "parent, family member or a responsible adult"); J.App. at 20 (San Francisco, policy to release minors to "a responsible adult").

State officials familiar with guardianship proceedings, moreover, testified that determining whether an available adult is fit to care for a child who would otherwise be incarcerated is relatively straightforward: their screening adults seeking appointment as temporary guardians, for example, involves a brief personal interview and a sworn petition setting out the proposed guardian's qualifications. 163 CR at 1159-60.

Jailing children, meanwhile, is not without its own costs or demands for special expertise. The INS conceded having made *no* effort to determine whether it would be more cost-effective to evaluate available adults than it is to detain children at taxpayers' expense. 79 CR 1669-70. The agency admitted that detaining a child costs the U.S. taxpayer up to \$100.00 per day per child. 159 CR 76.

⁷ U.S. Department of Health Education and Welfare, *Model Acts for Family Courts and State-Local Children's Programs* (1974); National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* (1982); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973); Institute of Judicial Administration/American Bar Association, *Standards Relating to Noncriminal Misbehavior* (1982), and *Standards Relating to Interim Status* (1982); National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act* (1968).

f. The record further established that the INS lacks the expertise necessary to care for children during months of open-ended confinement. Though the agency represents that it keeps children in "special child-care facilities," Pet.Brff. at 2, juvenile justice expert Paul Demuro, who evaluated several of the INS's facilities, saw things differently:

The El Centro facility is a converted migrant farm workers' barracks which has been secured through the use of fences and barbed wire ... At [the San Diego] facility each barracks is secured through the use of fences, barbed wire, automatic locks, observation areas, etc. In addition the entire residential complex is secured through the use of a high security fence (16-18'), barbed wire, and supervised by uniformed guards

No facility had recreational or educational areas, equipment or materials meeting accepted standards for juvenile detention. In all four facilities, young children ate their meals with unrelated adults. The major activity at each facility is TV watching and lining up to make collect telephone calls.

163 CR 1277.⁸

⁸ The INS argues that it has reformed its detention camps and that the "deplorable conditions" existing at the time it adopted its blanket detention policy are now irrelevant. Pet.Brff. at 32 n.31 Respondents disagree. First, the INS supports its portrayal of current conditions not by reference to any record evidence, but by pointing to a partial settlement agreement in which the agency agreed to settle respondents' claims concerning education, reading materials, commingling, recreation and visitation. There is no evidence that these or other conditions have actually improved. To the contrary, nine non-profit organizations that work with immigrant and refugee children presented voluminous evidence of public record to the court of appeals showing that conditions in INS camps remain deplorable. Brief *Amicus Curiae* of Immigrant, Refugee and Civil Rights

(1) The record shows that the INS confines children in privately operated detention facilities or in

Groups, March 1, 1991. These *amici* cite, *inter alia*, a recent state report on substandard conditions not raised in this lawsuit:

A recent case of a twelve year old undocumented youth taken into immigration court in handcuffs and shackles reignited public interest in INS treatment of youth.... INS has no standards for children in detention and according to the children's own testimony, use of handcuffs is not uncommon in addition to arbitrary punishment, inadequate food, lack of access to counsel or phones. One youth who was subsequently sent to Juvenile Hall described the vast improvement over INS detention conditions.

California Legislature, Joint Committee on Refugee Resettlement, International Migration and Cooperative Development, *Joint Interim Hearing on Impact of INS Policies and Reforms* (July 19, 1990). This report was issued long after INS now claims it remedied the deplorable conditions in its detention facilities.

Second, whether detention is consistent with the purposes assigned for it is properly determined by reference to the time the detention scheme is put into place. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-04 (1976) (purposes offered to justify policy must have actually motivated its adoption); *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring) ("due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the government as its justification"). Thus, belated improvements the INS made in its detention camps under the compulsion of this lawsuit cannot save a policy that was punitive and harmful *ab initio*. See J.App. at 9 (INS never evaluated whether conditions in detention camps were appropriate for children jailed under blanket protective detention policy).

In any event, the INS's acknowledgment that it housed children under deplorable conditions confirms just how difficult it is to care for children in an institutional setting, a task far more arduous than determining whether a child should be released to an extended family member or other concerned adult.

detention halls for delinquents run by state and local governments. The treatment children receive in the private facilities depends on the terms of the facility's contract with the INS. Detention camp operators typically report having *nothing* in their contracts requiring any special treatment for children. *E.g.*, 77 CR 671. The vast majority of children have been held in facilities lacking any license or accreditation for juvenile care. *Id.* at 712, 719-20.

One result of this lack of standards is that facility operators regularly exercised unfettered authority to strip search children with or without adequate cause. 78 CR 1153-54.⁹ Children in the INS's Laredo, Texas, "child care center" were strip searched because they visited with their attorneys, 78 CR 1153-54, purportedly to stop the lawyers from distributing literature soliciting clients. 76 CR 395.¹⁰

⁹ Although the INS would prefer to highlight its willingness to settle respondents' claims concerning certain jail conditions, the agency refused to halt arbitrary strip searches of children until ordered to do so by the district court. *See Flores v. Meese*, 681 F.Supp. 665 (C.D. Cal. 1988).

¹⁰ Plaintiff Ana Martinez was sixteen years old when the INS incarcerated her in the Laredo facility. 79 CR 1265. On at least two occasions she was forcibly strip searched solely because she had seen her lawyer. *Id.* at 1294-96. Ana described her experience as follows:

Q What happened after [your attorney] left?

A They searched me and they undressed me very ugly.

...
A She didn't touch me but she had me undress everything.

Q Including your underwear?

A Yes. I was very embarrassed. ...

A Since I didn't want to undress, she told me — she obligated me and threatened me.

Id. at 1294-96.

(2) The INS has routinely exposed children to daily contact with unrelated adult detainees of both sexes. At the ECI facility at El Centro, young unaccompanied males have been mixed with adult women. 159 CR 351. Young unaccompanied girls have been housed with adult women. *Id.* at 352. Children and adults shared the same unpartitioned showers and toilets. *Id.* at 353.

Similar practices have prevailed at other facilities. At the Border Patrol Staging Facility near San Diego, California, unaccompanied children of "tender age" shared bedrooms with adult females. 160 CR 271. There were no physical barriers between the male and female sleeping areas at the contract facilities at Hollywood, 77 CR 686, or Inglewood, 160 CR 356-57.¹¹

(3) Visitation policies at the detention facilities have also been inadequate. At the Casa San Juan facility in San Diego, California, the INS denied children any opportunity to visit with their family or friends. 163 CR 1070. At the Staging Area in San Diego, the INS never told children they could receive visitors. 160 CR 311. Not surprisingly, visits for children were "far and few between." *Id.* at 311. At the ECI facility in Inglewood, visits were limited to a single day per week, between the hours of 1-3 p.m. for thirty minutes, one visitor per child *if* staff felt it would not disrupt other duties. 159 CR 196-97; 160 CR 389, 392. Children had to request and complete an application form before being allowed a visit. *Id.* at 387.

¹¹ On at least one occasion, a boy was sexually abused by a female adult while in an INS contract facility in Laredo, Texas. An INS official dismissed the incident as perhaps having been "consensual." 159 at 145-46.

(4) The INS also concedes that children have had access to few or no educational services or reading materials while in its "protective" custody. 159 CR 83-84. The agency admitted that seven of the twelve facilities in which minors were most often held provided youngsters *no* education whatsoever. Those facilities accounted for over 64 percent of all detained juveniles. 78 CR 1159.¹² The INS disavowed any obligation to provide children education. *Id.* at 80. As one official put it, "*It is not [an INS] function. It would be costly.*" J.App. at 14 (emphasis supplied).

(5) Suitable recreation has also been persistently lacking at INS detention facilities. The director of one facility described "recreation" for children in stark terms: "Some of the little kids play in the dirt... Sometimes they go out there and let their tongue[s] hang out in the heat." J.App. at 26. During long periods of extremely hot weather, detainees at the ECI-El Centro facility have been let outdoors only at 7:00 a.m. or 7:00 p.m., for 20 or 25 minutes. *Id.* Providing children time outdoors was a low priority. *Id.*¹³

¹² Reading materials have often similarly been unavailable. The Inglewood ECI facility purchased no books of any kind, and the only reading materials children had were those occasionally donated by concerned individuals. 160 CR 400

¹³ At the Staging Facility in San Diego, even outdoor access is a mixed blessing: once a child goes outside, the INS may refuse to let him or her back in. Children have been forced to remain in the exercise yard the entire day without access to dormitories, toilets or drinking fountains. 160 CR 314-15. Not surprisingly, most children opt to spend the entire day indoors watching television. *Id.*

g. Responding to these undisputed facts, the district court ordered two things. First, the INS should not automatically deny release to responsible adults solely because they are not a minor's blood relative. The district court did not *mandate* release—it simply required that the INS determine whether *there are reasonable grounds not to release*.¹⁴ As stated, the district court left it to the INS to develop policies and procedures to implement the brief order. Second, in those instances where INS denies release, a child's custody status should receive timely independent review.¹⁵

The court of appeals, sitting *en banc*, affirmed. As has been seen, the INS failed to produce *any* evidence that automatic restrictions on children's freedom protects them. On the other side of the equation, children's "strong interest in liberty" must freely be conceded. App. at 15a. Accordingly, the court of appeals held that, although the INS may "determine on the basis of the particular case whether release of the child poses a danger to the community or could result in harm to the child, the *blanket* refusal to make individualized determinations in the guise of

¹⁴ The district court's order requires the INS to release "any minor otherwise eligible for release to his parents, guardian, custodian, conservator, or other *responsible* adult party." App. at 146a (emphasis supplied). *A fortiori*, the agency need not release if it has any actual reason to believe that an available adult is not "responsible."

¹⁵ Of course, nothing in the district court's order bars the INS from exercising discretion to deny release to persons it deems unable to care for a child or produce him or her for deportation proceedings. Similarly, nothing bars the INS from *preferring* one placement over another. The INS is therefore not required to determine the fitness of an individual custodian where placement in a licensed community shelter, foster care program, group home, or other suitable shelter is available.

administrative expediency cannot pass constitutional muster." *Id.* at 21a (emphasis supplied).

SUMMARY OF THE ARGUMENT

A

Under the Constitution of the United States, an individual's interest in freedom from physical restraint is the essence of liberty. A minor may not be deprived indefinitely of physical liberty unless that deprivation is justified by an important governmental interest and is narrowly tailored to minimize infringement on personal liberty. Because detention is generally *not* in a child's best interests, the INS's automatic incarceration policy serves only to save it from determining who is and who is not an appropriate custodian. This interest falls well short of a substantial or compelling governmental interest justifying open-ended confinement.

B

Existing INS procedures afford children *no* procedural protection against the needless deprivation of their personal liberty: the INS initially refuses to determine whether detention is actually in a child's best interests and then provides children no procedure by which that decision must be reviewed. A child's fundamental interest in physical liberty may not be denied unless the Government carries the burden of proving that detention is warranted. Constitutionally minimal procedures include an initial assessment of the need to detain a given child and, prior to an extended restraint on a child's liberty, neutral and detached review of his or her custody.

C

Whenever possible, a statute should be construed so as to avoid questions concerning its constitutionality.

Construing the INA to permit automatic, open-ended confinement of children raises serious constitutional questions. The INS's detention policy exceeds its authority under the Immigration and Nationality Act, properly construed, because it imposes *automatic* detention, not detention pursuant to any actual exercise of discretion. This Court has repeatedly held that under the INA the INS must *exercise* discretion to detain in an individual case, and the agency here seeks to pursue a statutorily impermissible policy of blanket detention.

ARGUMENT

I ADMINISTRATIVE CONVENIENCE IN REFUSING TO EVALUATE THE NEED FOR OPEN-ENDED DETENTION CANNOT JUSTIFY ABRIDGING A MINOR'S FUNDAMENTAL RIGHT TO FREEDOM FROM PHYSICAL RESTRAINT.

The Due Process Clause of the Fifth Amendment both guarantees procedural fairness in connection with any governmental deprivation of liberty and "contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Foucha v. Louisiana*, __ U.S. __, 60 U.S.L.W. 4359, 4361 (1992). Official action that burdens fundamental constitutional rights must (1) serve an *important* governmental purpose, and (2) be *narrowly tailored* to minimize the infringement on individual liberty. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

The INS argues that the governmental interest in protecting children is compelling; respondents agree. Looking at this case from the standpoint of a *parens patriae* interest, however, the INS's policy is

anything but narrowly tailored to minimize infringement on children's personal liberty. Clearly, the INS's blanket detention policy sweeps broadly and needlessly across respondent children's freedom from physical restraint.

First, the Government does not argue, nor could it, that a child's welfare and safety are as a general matter better served by detention than by release to a safe, non-custodial environment. The INS has never disputed that sound child welfare practices, embodied in both federal and state law and practice, provide that a child's best interests are served by placement in a non-custodial setting. See 18 U.S.C. §§ 5032 *et seq.*; 42 U.S.C. §§ 627 and 671. Indeed, this fundamental principle of child welfare has been repeatedly recognized by this Court. *E.g.*, *Lehman v. Lycoming Co. Children's Services*, 458 U.S. 502 (1982).

Second, the Government never established, nor could it, that extended family members or other responsible adults are any more predisposed to harm children than are those immediate blood relative adults on the agency's approved list. Indeed, the agency admitted having *no* evidence that children released to adults appearing on its present list are any safer than those it previously released to other custodians. J.App. at 15.

Third, the Government concedes that procedures do exist to determine whether an adult is fit to care for a child who would otherwise be consigned to indefinite detention. The Government acknowledges that precisely such determinations are routinely and reliably made in a variety of settings. Pet. Br. 20, 28. Such determinations were regularly and successfully made by the agency until 1984, and have been regularly made since 1988 under the district court's order without incident.

Finally, nothing in the district court's order requires the INS to release a child where doing so would be contrary to a sound *parens patriae* interest. To this day, the INS is perfectly free to detain minors whenever doing so is warranted under the circumstances.

In reality, therefore, this case is patently *not* about the Government's interest in protecting children, but rather its interest in refusing to determine whether a child's welfare is furthered by detention. Hence, in the final analysis, this case has far less to do with protecting children than with enabling the INS to avoid the administrative inconvenience of determining whether detention would actually further any true *parens patriae* interest.

As a matter of constitutional law, such administrative inconvenience has never been held to justify the open-ended detention of children, or anyone else, for that matter. In any event, the uncontroverted record shows that determining cause for open-ended detention is both administratively feasible and imposes far fewer burdens on the INS's resources than does caring for children's physical, emotional, social, and developmental needs during months of custodial detention. Nothing in the INS's blanket detention policy warrants the open-ended deprivation of children's fundamental right to physical liberty.

A Respondent's interest in freedom from physical restraint is entitled to strong constitutional protection.

Detention, of course, is the very essence of a deprivation of liberty: "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," and "commitment for any purpose constitutes a significant deprivation of liberty that

requires due process protection." *Foucha*, 60 U.S.L.W. at 4362.

As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth ... Amendment[].

Id. at 4365 (Kennedy, J., dissenting). Thus, this Court subjects "to *heightened* due process scrutiny, with regard to both *purpose* and *duration*, deprivations of physical liberty imposed before a judgment is rendered ..." *Id.* (emphasis added).¹⁶

Given this precedent, the INS largely concedes that its detention policy cannot withstand the heightened due process scrutiny to which deprivations of physical liberty are generally subjected. Accordingly, the INS offers that the Court should discount the protection physical liberty has heretofore received under our Constitution because respondents are minors, and incarcerating children should be seen not as depriving them of physical liberty, but as infringing upon a relatively unimportant "right to be released to an unrelated adult."

Under this Court's precedents, however, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In Re Gault*, 387 U.S. 1, 13 (1967).

¹⁶ Clearly, nothing in this case asks the Court to "expand the concept of substantive due process," *Collins v. City of Harper Heights, Tex.*, 112 S.Ct. 1061, 1068 (1992) or to "discover new fundamental rights imbedded in the Due Process Clause," *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). Respondents' claim is firmly rooted in the core meaning of "liberty" as explicitly guaranteed by the Constitution: that is, it is a right both "implicit in the concept of ordered liberty," and "deeply rooted in this Nation's history and tradition," *Bowers*, 478 U.S. at 191-192.

Respondents' interest in not being jailed needlessly is just as strong, if not stronger, than an adult's. *Parham v. J.R.*, 442 U.S. 584, 600 (1979).¹⁷ Thus, this Court has never held that juveniles have generally diminished liberty interests such that government's incarcerating them fails to implicate an important constitutional right. Rather, the Court has held that a juvenile's interest in freedom from institutional restraint may "*in appropriate circumstances*, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child." *Schall v. Martin*, 467 U.S. 253, 265 (1984) (emphasis added).

Distorting this principle in an effort to minimize the import of its detention policy, the INS suggests that children "are always in some form of custody" anyway, so that detaining a child is somehow less repugnant to the Constitution. Pet.Br. at 26. But the INS's view that open-ended detention impairs only a child's right to release to an unrelated adult stands the Constitution on its head. It is not up to the

¹⁷ The INS's highly theoretical approach, moreover, says nothing about the obvious and substantial differences between a parent's or other caregiver's custody of a child, and custody of a child that has never been determined to be in a child's best interests:

It is difficult for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty and has to spend the night or several days or weeks in a cold impersonal cell or room away from home or family.

In re William M., 3 Cal.3d 16, 31 n.25, 89 Cal.Rptr. 33 (1970); see also *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 510-11 & n. 12 (1982) (distinguishing between children in the "custody" of parents or foster parents, who are "at liberty" and "suffer no unusual restraints not imposed on other children," and children "actually confined in a state institution").

individual to prove a right to release; it is up to government to justify detention. To define the right at issue here as one of "release to an unrelated adult" distorts respondents' claim. Respondents simply assert a right not to be detained without individually determined good and sufficient cause.

Schall, it must be appreciated, held that the range of governmental interests justifying restraints on liberty, in the case of children, includes a *parens patriae* interest in caring for and protecting those who "are not assumed to have the capacity to take care of themselves." 467 U.S. at 265. As this Court explained in *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), "although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern ... sympathy, and ... paternal attention.'" The question remains, therefore, whether the INS's detention scheme in fact is narrowly tailored to serve a legitimate *parens patriae* interest.

B Blanket detention of children serves no legitimate governmental interest.

Though the INS at times argues otherwise, this case has little to do with government's interest in protecting children. Rather, respondents contend, and the INS largely concedes, that this detention scheme is really aimed at saving the agency the trouble of deciding whether incarceration would actually be in a child's best interests. Both as a matter of law and of fact, administrative convenience is a poor justification for the open-ended detention of children.

First, even where less important constitutional rights are at stake, this Court has repeatedly rejected

administrative cost as a justification for deprivation of individual liberties. See *Bounds v. Smith*, 430 U.S. 817, 8__ (1977). When it comes to detention, this Court has consistently held that deprivation of physical freedom is permissible only when Government has shown a significant need to detain, despite the administrative costs necessarily involved in doing so.

In *Schall v. Martin*, 467 U.S. 253 (1984), for example, the Court considered New York's scheme for the pre-trial detention of accused juvenile delinquents. Under that scheme, detention was "strictly limited in time." *Id.* at 269. A juvenile arrested for a particularly serious crime could be held no more than 17 days before having a full-blown juvenile trial; those arrested for lesser crimes could be detained no more than six days before having a trial. *Id.* at 270.

Even within these strict time limits, the juvenile was entitled to multiple due process protections. The juvenile had to be brought before a family court judge no later than 72 hours after arrest. *Id.* at 258 n.6. No more than three days after this initial appearance, a detainee was entitled to a "probable-cause hearing," *id.* at 269-70, at which the juvenile was entitled to the assistance of counsel, to call witnesses, and to offer evidence in his own behalf. *Id.* at 277. If the juvenile court found probable cause, it had to again decide whether continued detention was necessary to "protect the community from crime." *Id.* at 264.

In *United States v. Salerno*, 481 U.S. 739 (1987), this Court upheld detention without bail of dangerous criminal defendants under the Bail Reform Act. There again the law "carefully limit[ed] the circumstances under which detention may be sought to the most monstrous of crimes." *Id.* at 747. The arrestee was entitled to a prompt, "full-blown adversary hearing" at which the government had to convince a neutral decisionmaker that the arrestee

presented an identified and articulable threat to an individual or the community. *Id.* at 750.¹⁸

Most recently, in *Foucha v. Louisiana*, _ U.S._, 60 U.S.L.W. 4359 (1992), this Court struck down a state statute that placed the burden of proof on an insanity acquittee to show that he or she was not dangerous in order to gain release from a state mental institution. Under the state scheme the acquittee had received a complete criminal trial before commitment, *id.* at 4360; and was entitled to a multiple, periodic hearings to determine his present sanity and dangerousness, *id.* at 4369 (Thomas, J., dissenting). The Court held that the state must nonetheless assume the burden of proving cause for continued confinement in each case by clear and convincing evidence. *Id.* at 4363.

The detention here at issue, in contrast, involves at least two major steps beyond anything yet approved in this Court's jurisprudence:

First, detention under the regulation at issue is unrestricted in time. A child incarcerated under a INS's policy is subject to *indefinite* detention. Nothing in INS regulations requires that a deportation hearing be completed or an individual released from detention within any specific time. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (person charged with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time).

Second, the INS would detain children indefinitely without the slightest procedural protection. Children are *automatically* incarcerated "for their own good" without the INS's ever having to convince a neutral

or detached decisionmaker that such detention is in a child's best interests.

These precedents leave no doubt but that the INS's interest in refusing to determine need for detention is simply not enough to override the strong constitutional protection to which personal liberty is entitled under our Constitution. The record, moreover, demonstrates that the INS *in fact* possesses ample resources and expertise to bring its detention scheme up to constitutional norms. As Judge Rymer points out,

While the INS argues that it lacks resources to conduct home studies, there is no substantial indication that some investigation or opportunity for independent, albeit informal consideration of the juvenile's circumstances in relation to the adult's agreement to care for her is impractical or financially or administratively infeasible.

App. 48a-49a (Rymer, J., concurring in part and dissenting in part). For multiple reasons, the INS's unwillingness to evaluate cause for detention is a poor excuse for its wholesale institutionalization of children.

First, *jailing* children places an enormous drain on administrative resources. The INS conceded having made *no* effort to determine whether it would be more cost-effective to evaluate available adults than it is to detain children at taxpayers' expense. 79 CR 1669-70. The agency admitted that detaining a child costs the U.S. taxpayer as much as \$100.00 per day per child. 159 CR 76. As the brief *amicus curiae* of shelter service providers points out, a child can be cared for in a licensed, approved shelter or foster home for between \$29 and \$35 per day, a fraction of what it now costs the INS to keep a child in a custodial facility.

¹⁸ Further, the maximum length of pretrial detention was "limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 747.

Brief *Amicus Curiae* of U.S. Catholic Conference, *et al.*, at 16 n.1.

Second, the uncontroverted record shows that under both its pre-1984 policy and the district court's order, the INS has for years released minors to responsible adults and shelter programs without incident. No report has ever been made of a child's being harmed or neglected.¹⁹

Third, screening potential custodians is simply not the impossible task the INS makes it out to be. The uncontroverted record establishes that probate courts screen guardians through a brief interview and application. The INS fails to explain why it cannot manage similar procedures to save respondent children from months of open-ended confinement.

¹⁹ Indeed, the INS is an investigative agency and as such routinely evaluates the character and moral fitness of individuals seeking immigration benefits or citizenship. For example, the INS routinely passes on the bona fides of marriages: that is, whether a husband and wife have entered into marriage for conventional reasons or solely to confer an immigration benefit. 8 U.S.C. § 1154(c). In adjudicating tens of thousands of applications for adjustment of status, the INS must daily determine, *inter alia*, that he or she does not "have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others," 8 U.S.C. § 1182(a)(1)(A)(ii)(I); is not "a drug abuser or addict," 8 U.S.C. § 1182(a)(1)(A)(iii); is not coming to the United States to engage in "any ... unlawful activity," 8 U.S.C. § 1182(a)(3)(A)(ii); and is not "likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4). Similarly, the INS routinely determines whether applicants for suspension of deportation are persons "of good moral character." 8 U.S.C. § 1254. The INS offers *no* reason why these investigative powers are suddenly inadequate to evaluate potential custodians for children who would otherwise spend open-ended terms in its detention camps.

The INS is now, in fact, successfully pursuing just such a procedure under the district court's order.²⁰

Fourth, although insisting that it "is the only federal agency with responsibility for caring for these juveniles," Pet.Br. at 31, the INS makes *no* effort to turn children over to state or local government authorities, authorities the agency admits have the resources, expertise, and obligation to care for unaccompanied children. Compare 18 U.S.C. § 5032 (general policy of federal government to defer to state and local authorities in matters concerning juvenile delinquency).

Finally, if the INS cannot manage to screen potential custodians, *how can it possibly expect to care for the physical, emotional, spiritual and developmental needs of children during months of open-ended confinement?* As has been seen, the uncontroverted record establishes that the INS has proved more successful at evaluating potential custodians than it has been at institutionalizing children. As the brief *amicus curiae* of advocates for immigrant and refugee children points out, conditions for children in open-ended INS detention remain substandard.

In the final analysis, the INS's categorical refusal to make any inquiry into whether release to an extended family member or other reputable caretaker

²⁰ The INS's past success in evaluating potential custodians is not surprising. As the INS points out, a good portion of the minors it arrests are males between sixteen and seventeen years old. Pet.Br. at 9 n.12. The INS's notion that it would have to perform full-blown home studies to protect such minors against abuse by a godmother or church group is both counterintuitive and unsupported by the record. Releasing younger children, of course, presents greater risks, but then so does detaining them. These examples simply underscore the irrationality of a blanket approach to detaining minors.

would pose any danger to the child or the community undercuts its professed *parens patriae* interest. The INS purports to ensure the welfare of children by routine detention, but such detention—without trial, without even a mandatory custody hearing, and without *any* factual showing that detention is necessary to ensure respondents' welfare—serves only to aid the INS in making easy, blanket judgments concerning custodians. This purpose is simply inconsistent with any proper *parens patriae* interest.

C Plenary authority to regulate immigration does not imbue the INS with special powers to impose open-ended detention solely for child welfare purposes.

The foregoing has shown that automatic, open-ended detention simply cannot withstand the exacting constitutional scrutiny to which governmental deprivations of physical liberty must be subjected. The INS seeks to escape this result by demanding "special judicial deference" that they contend must be employed whenever any INS policy is at issue, whether or not the policy actually reflects immigration-related concerns. Such a sweeping assertion is flatly incorrect.

To begin with, respondents do not dispute the principle of judicial deference to Congress's substantive immigration policies. Indeed, respondents' wholeheartedly agree with Congress's declared policy to minimize the detention of children, 18 U.S.C. § 1354, and wish the INS shared that view.²¹

Further, the lack of relationship between targeting children for open-ended detention and immigration is undisputed. Petitioners flatly concede that the policy at issue has nothing to do with our country's immigration policy in general, with the deportation process in particular, or even with children's status as alleged aliens. In fact, children's status as aliens is wholly incidental to the deprivation to which they are being subjected—children are refused release only for purported child-welfare reasons, not because they are suspected of being in the country illegally or of being a threat to the public or the national security. Pet. Br. at 27. Such individualized determinations are never reached under the INS's detention scheme.

The principle that not every policy directed to non-citizens is entitled to special judicial deference is amply illustrated in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), where this Court invalidated a federal regulation promulgated by the Civil Service Commission that excluded aliens from most federal government employment. Even though the rule was directed at aliens and was defended as furthering immigration and foreign policy goals, the Court struck it down because the goals were not shown to underlie those restrictions. *Id.* at 104. The Court refused to apply the deferential review requested by the Government. *Id.* at 104-05.

Hampton demonstrates that merely affecting immigration or targeting immigrants is not sufficient to bring a federal regulation or policy within the ambit of the "special judicial deference" rule that the INS suggests saves its otherwise unconstitutional policy. Where, as here, a policy is demonstrably and admittedly *unrelated* to

²¹ Of course, whatever authority the INS enjoys to regulate immigration is derivative from and subordinate to that of Congress. See generally *Abourezk v. Reagan*, 785 F.2d 1043, 1061

(D.C. Cir. 1986), *aff'd* 484 U.S. 1 (1987); *Haitian Refugee Ctr. v. Civiletti*, 503 F.Supp. 442, 452-53 (S.D. Fla. 1980), *aff'd as modified*, 676 F.2d 1023 (5th Cir. 1982) (collecting authorities).

immigration, plenary immigration authority does nothing to save an otherwise impermissible provision.²²

The case law on which petitioners rely is not to the contrary. *Mathews v. Diaz*, 426 U.S. 67 (1976), for example, concerned an express congressional policy providing certain medicare "benefits to some aliens but not to others" *Id.* at 80. The Court upheld the policy, stating that it was "unquestionably reasonable ... to make an alien's eligibility depend upon both the character [permanent resident status] and the duration [5 years] of his residency." *Id.* at 83. Thus, in *Diaz*, the plaintiffs' status as *aliens* was not only a consideration underlying the policy, it was the primary consideration: Congress made a decision that certain aliens should not "share in the bounty," *id.* at 80, precisely because they were not as deserving as citizens and long-term permanent resident aliens.²³ Here, the fact that respondents are *allegedly* aliens has nothing to do with INS' decision to detain

them; only respondents status as *children* is taken into account.

More importantly, *Diaz* involved entitlement to welfare benefits, something that has traditionally received only minimal constitutional protection. *Id.* at 83-84. Indeed, *Diaz* would likely have been decided no differently had the plaintiffs in that case been citizens. *Id.* at 84 n.23 (citing *Weinberger v. Salfi*, 422 U.S. 749, 768 (1975)). The remaining cases petitioners cite similarly fail to support their claim for judicial deference to a purely child-welfare policy.²⁴

The authority of the United States Congress to determine who shall enter and remain in the country is, of course, the ultimate political choice in the immigration field and at the heart of immigration decisionmaking to which courts have traditionally deferred. Whether or not the plenary immigration authority extends to other immigration-related concerns, it is clear that it cannot be distended to

²² The INS tries to distinguish *Hampton* by arguing that in that case the "wrong agency" was attempting to exercise plenary immigration authority. Petition at 17 n.15. In *Hampton* the Civil Service Commission *was* the "wrong agency" to be promulgating immigration policy. So too, is the INS the "wrong agency" to be promulgating child welfare policy at odds with what Congress itself has declared.

²³ The policy at issue in *Diaz*, moreover, was clearly related to global immigration and foreign policy concerns. As the *Diaz* Court pointed out, "[a]ppellees ... are but two of over 440,000 Cuban refugees ... [a]nd the Cuban parolees are but one of several categories of aliens who have been admitted in order to make a humane response to ... an international political situation." *Id.* at 81. In this case the INS has never claimed that its policy was influenced by even limited immigration-related objectives, much less such expansive geopolitical concerns.

²⁴ Indeed, those very cases suggest the boundaries of the federal government's plenary authority over immigration, since the policies challenged were directly and explicitly related to "which classes of aliens may lawfully enter the country," *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), and which "shall be allowed to stay," *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1951).

In *Galvan v. Press*, 347 U.S. 522, 525 (1954), petitioner challenged the validity of the Internal Security Act of 1950, which "required deportation of any alien who ... was a 'member' of the Communist Party." *Harisiades v. Shaughnessy*, 342 U.S. 581 (1952), addressed "whether the United States constitutionally may deport a legally resident alien because of membership in the Communist Party." *Fiallo v. Bell*, 430 U.S. 787, 790 (1977), involved the rights of "unwed natural fathers and their illegitimate offspring" to "special immigration preference" to enter the United States. And, in *Kleindienst v. Mandel*, 408 U.S. 753, 755 (1972), the Court upheld the Attorney General's discretion to exclude an advocate of the "doctrines of world communism."

shield a purely child-welfare policy, an agency policy at odds with what Congress itself has embraced. For its part, the INS suggests no way in which its regulatory authority is logically bounded. Under the INS's view, it could justify virtually every violation of the Constitution by simply pointing out that it is the agency that regulates immigration. Here, the policy does not involve core immigration concerns, or even immigration-related concerns at all, only a child-welfare policy haphazardly arrived at by the INS. Special deference is wholly unwarranted.

In conclusion, petitioners' claim that their policy protects children is illusory. The INS cannot plausibly claim that it is acting to protect the respondent children's safety and welfare, and at the same time refuse to make any factual determination that open-ended confinement is at all necessary. In all other cases in which this Court has found detention prior to trial or without trial legitimate, detention was imposed only upon a due process determination that detention was necessary to serve the government interest at stake. Thus, in *Salerno*, the Court pointed out that the pretrial detention policy at issue was not a "scattershot attempt" to detain persons who might be dangerous, but instead required the government "to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person," *Salerno*, 481 U.S. at 750. If the INS would detain children to protect them, it must *determine* that such detention is necessary.

But in reality, the INS's policy has nothing to do with protecting children, but with saving the INS the administrative inconvenience of determining whether detention is at all necessary. The INS attempts to justify its refusal to determine cause for

detention by professing a lack the expertise and resources. Such grounds have never been deemed sufficient to justify open-ended deprivation of personal liberty. In any event, the petitioners' ostensible lack of expertise and resources is both illogical and thoroughly inconsistent with the uncontroverted record. The INS purports to have the expertise and resources to undertake the far more difficult task of caring for children during months of open-ended confinement, yet cannot manage the screening procedures it for years has employed with unbroken success. On this record, the INS's case for the automatic, open-ended detention of children cannot possibly pass constitutional muster.

II THE DISTRICT COURT'S ORDER SHOULD BE AFFIRMED IN ITS ENTIRETY AS ACCORDING CHILDREN MINIMAL PROCEDURAL PROTECTION AGAINST THE NEEDLESS DEPRIVATION OF PERSONAL LIBERTY.

It has long been settled that "[t]he Fifth Amendment ... protects every [alien within the jurisdiction of the United States] from deprivation of life, liberty, or property without due process of law. ... Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (citations omitted).²⁵

²⁵ It is, of course, within the special competence of the judiciary to determine what process is constitutionally due aliens within the United States. *Woodby v. INS*, 385 U.S. 276, 284 (1966) (constitutionality of deportation procedures "the kind of question which has traditionally been left to the judiciary to resolve..."). See also *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by

Concurring and dissenting below, Judge Rymer points out that "the district court's order may be seen as wholly procedural and could be affirmed on procedural grounds." App. at 43a-44a. The essence of that order is that the INS must provide *some* procedure by which to determine that detention would actually be in a child's best interests if it is to jail that child indefinitely. The district court's order should be affirmed as according children minimal procedural protection against the needless deprivation of their personal liberty.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court formulated the test by which minimum procedural requirements are determined:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the safeguards; and finally, the government's

the Fifth and Fourteenth Amendments"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598-99 (1953); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) ("we have extended to the person and property of resident aliens important constitutional guarantees—such as the due process of law"); *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 837-41 (1987) (Court reviews deportation procedures under Due Process Clause for availability of "effective judicial review").

Plasencia v. Landon, 459 U.S. 21 (1984), is not to the contrary. Indeed, that case was remanded to the court of appeals to consider Plasencia's claim under the three-part *Mathews v. Eldridge* test. In any event, *Plasencia* involved procedural protections due an alien seeking to enter the country. In the exclusion context it is well-settled that the political branches have far greater latitude than when they seek to deprive a person within the United States of basic constitutional rights. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Application of this test fully supports the district court's modest order.

1. The first element of the *Mathews* due process formulation looks to the private interest affected by official action. As has been seen, children's right to personal liberty is fundamental, and as such is entitled to the utmost procedural protection. The importance of the right here at stake militates with unparalleled force in support of adequate procedures for the protection of respondents' personal liberty.

2. The second *Mathews* element also weighs decidedly in support of the district court's order: in the vast majority of cases where the INS would deny release, minors can be released safely to reputable adults or shelter care programs not appearing on the agency's short list.

The record is dispositive. For years the INS has released children to responsible adults and shelter-care programs without incident. *For almost three years now, responsible adults and youth shelters have cared for scores of children who would have languished in INS jails but for the district court's order. Had the INS been permitted to enforce its regulation, hundreds of children would have been locked up in order to protect none of them.* Beyond any doubt, the INS's blanket approach to detaining children needlessly deprives the vast majority of those to whom it is applied of their fundamental right to personal liberty. This degree of erroneous deprivation is more than mere risk—it is a guarantee of needless incarceration.

The INS, of course, must ultimately concede that its existing procedures are not intended to save a child from being erroneously deprived of personal liberty. Pet.Br. at 34-35. True to form, INS regulations require *no* review—by district director, immigration judge, or anyone else—of the factual case for restrictions on a child's release. Judge Rymer described this procedural vacuum in stark terms:

INS regulations provide no opportunity for the reasoned consideration of an alien juvenile's release to the custody of a non-relative by a neutral hearing officer. Nor is there any provision for a prompt hearing on a § 242.24(b)(4) release. No findings or reasons are required. Nothing in the regulations provides the unaccompanied detainee any help, whether from counsel, a parent or guardian, or anyone else. Similarly, the regulation makes no provision for appointing a guardian if no family member comes forward. There is no analogue to a pretrial services report, however cursory. ... Although not entirely clear where the burden of proof resides, it has not clearly been imposed on the government. And there is no limit on when the deportation hearing must be held, or put another way, how long the minor may be detained. In short, there is no ordered structure for resolving custodial status when no relative steps up to the plate but an unrelated adult is able and willing to do so. ...

For all that appears from the regulations, the juvenile without parent, guardian or relative is left in procedural limbo. Second, there is no provision for reasoned consideration by a neutral hearing officer. Time limits and impartiality are basic safeguards against arbitrary action. ... To omit both increases the

risk that the juvenile for whom detention is not needed and for whom there is a prospective adult willing to assume care and assure appearance will not be released because of inattention, inadvertence or intransigence.

App. 48a-49a (Rymer, J., concurring in part and dissenting in part) (emphasis added; citations omitted).

The INS responds that Judge Rymer simply misses the point. According to the INS, it has broadly declared who is and who is not an appropriate custodian; therefore whether detention actually protects any given child is *irrelevant*. *Id.* at 35. The pertinent inquiry, the agency suggests, is whether an available custodian is of an approved type. *Id.*

The faults with this approach are several. First, the agency's policy itself provides that children may be released to custodians not appearing on its approved list under "unusual and compelling" circumstances, yet sets up no procedure by which a child may demonstrate entitlement to such release.

More importantly, as the "interest" prongs of the *Mathews* test suggest, procedural due process looks to the governmental and private purposes served by a procedural determination. For example, in *Addington v. Texas*, 441 U.S. 418, 425 (1979), this Court considered the standard of proof required in a civil proceeding to commit an individual involuntarily. The Court held that "civil commitment for any purpose" must be supported by clear and convincing evidence of individual dangerousness. *Id.* at 425. In so doing, this Court pointed out that it is the state's legitimate interest in *protecting* such individuals and the community, not its interest in avoiding administrative inconvenience, that is germane to the due process inquiry:

The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional

disorders to care for themselves ... [H]owever, *the state has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others.*

Id. at 426 (emphasis added).

As in *Addington*, the Government has *no* interest in detaining a child who could be released safely. Indeed, the INS pins its case for detaining children solely on the strength of its interest in *protecting* them. Similarly, in the Juvenile Justice and Delinquency Act, Congress makes clear that minors should be detained only if a magistrate "determines, after hearing, ... that detention of such juvenile is required to ... insure his safety or that of others." 18 U.S.C. § 5034. Both the INS and Congress, therefore, eschew any interest in detaining children who could be released safely. To the contrary, Congress has made abundantly clear its interest in minimizing the detention of minors. Juvenile Justice and Delinquency Prevention Act of 1974, Pub.L. 93-415, 88 Stat. 1109, *codified at* 42 U.S.C. §§ 5631 *et seq.*

In short, the interest prongs of the *Mathews* balancing test—here personal liberty and the need to curtail that liberty in a child's best interests—and the INS's and Congress's disavowal of any desire to detain minors who could be safely released, properly focus the due process inquiry. Existing procedures must be evaluated by reference to those interests: that is, by asking whether INS procedures are adequate to prevent needless confinement.

3. Turning to the third prong of the *Mathews* test, it may be readily appreciated that requiring the INS to determine actual cause for detention is a valuable, indeed indispensable, procedural protection. In *Foucha v. Louisiana*, — U.S. —, 60 U.S.L.W. 4359 (1992), this Court held that *the state* must prove by

clear and convincing evidence its case for continuing to detain an insanity acquittee in a mental institution once that individual is no longer insane:

Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, *the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous.* At the hearing which ended with Foucha's recommittal, no doctor or any other person testified positively that in his opinion Foucha would be a danger to the community, let alone gave the basis for such an opinion. ... This, under the Louisiana statute, was enough to defeat Foucha's interest in physical liberty. It is not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility.

60 U.S.L.W. at 4363 (emphasis supplied).

Foucha thus affirms the maxim, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). If detention is to be carefully limited, the Constitution obliges *government* to show in the first instance adequate cause for depriving an individual of physical liberty, and it must do so before a neutral and detached decisionmaker.

Regardless of whether incarceration is nominally civil or criminal, due process has always included independent review of the initial decision to detain. In cases involving involuntary commitment of children, this Court has specifically required review

by a neutral and detached trier-of-fact. *E.g.*, *Parham v. J.R.*, 442 U.S. 584, 606-07 (1979).

In stark contrast to its approach to detention, the INS argues that children can be expected to ask for a hearing to review restrictions on their liberty. Now leaving minors to fend for themselves, the INS argues that forcing a child to seek a "bond redetermination" hearing is all the process that is due. In *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981), the state similarly argued that mental patients were free to test their confinement through habeas corpus proceedings and that automatic administrative review of short-term custody was constitutionally unnecessary. The court of appeals made the obvious point:

No matter how elaborate and accurate the habeas corpus proceedings ... may be once undertaken, *their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place.* It is the state, after all, which must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation.

Id. at 1023 (emphasis added).

Like the mentally disabled, children are simply not protected by "on-request" procedures, procedures they cannot realistically be expected to set into motion in the first place. Not surprisingly, the INS is utterly alone in putting the onus on children to ask for a custody hearing: juvenile justice standards uniformly require prompt independent review of the grounds for a child's detention *without* request. *E.g.*, 18 U.S.C. § 5033 ("The [arrested] juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a

magistrate"); see also *Schall v. Martin*, 467 U.S. 253, 255 and n.3 (1984).

Sadly, the INS simply sheds its self-professed *parens patriae* obligation at the jailhouse door. Although the agency defends its detaining children as reflecting an obligation to care for them, it leaves a youngster on his or her own when it comes to invoking procedural protections against superfluous confinement. *E.g.*, Petition for Certiorari at 23 ("[A] child is adequately protected by his right to seek a hearing before the immigration judge"). The Due Process Clause obviously requires better of our Government.

The INS alternatively suggests that state guardianships provide procedure enough to save a child from needless confinement. As the record establishes, however, not only are children in INS detention simply ineligible for guardianships, they cannot reasonably be expected to invoke such procedures from the confines of remote INS detention facilities. Under such conditions, state guardianship procedures are appropriately seen as protecting an *adult's* right to become a guardian, not a *child's* right to freedom from institutional restraint. After all, it is the INS that detains a child, and it is the INS, not state officials, that must meet the procedural requirements of the due process clause to justify that detention. The INS's passing the procedural buck is surely not due process.

4. The final element of the *Mathews* balancing test looks to the fiscal and administrative burdens that additional procedures would entail. The INS excuses its failure to afford children procedural protection against needless confinement by pleading incompetence to perform "home studies" or to otherwise evaluate custodians not on its approved

list. As has been seen, the uncontroverted record shows this justification to be completely untenable.²⁶

Nor does the requirement that, in the case of a minor, the agency provide a bond redetermination hearing to a child facing prolonged detention add significantly to the INS's administrative burden. The INS began holding custody hearings for minors on June 13, 1988. Plaintiffs'/Appellees' Supplemental Brief on Rehearing En Banc, Appendix 3.²⁷ From that time until September 26, 1989, custody hearings were held for only 416 minors nationwide— *less than one hearing per day*. *Id.*, Appendix 1 at ¶¶ 4 and 9. Forty-five percent of these were held as part of a bond redetermination, which under its own regulations the agency has to provide regardless. *Id.* at ¶ 9. Many of the remaining custody hearings were held jointly with deportation proceedings, which the INA obliges the agency to provide regardless. Appendix 3 at 2.

As the court of appeals pointed out, "The only new requirements [under the district court's order]... are that, if the alien is a child, such a hearing must be held regardless of whether the alien requests it, and the determination at the hearing must include an inquiry into whether any non-relative who offers to take custody represents a danger to the child's well being." App. 25a. The INS could not possibly be

burdened by providing children such minimal procedural consideration.

The *Mathews* due process balancing test, therefore, leaves no doubt but that current INS "procedures" are inadequate to the task of ensuring that children are not needlessly incarcerated. As this Court has held before,

Procedure by presumption is always cheaper and easier than individualized determination. But where, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.

Stanley v. Illinois, 405 U.S. 645, 656-57 (1972). *See also Weinberger v. Salfi*, 422 U.S. 749, 785 (1975) (individualized determinations required where "affirmative Government action ... seriously curtails important liberties cognizable under the Constitution").

In sum, precedents delineating the procedures due individuals deprived of physical liberty prior to trial unquestionably support the district court's order. *Mathew's* general test for due process confirms this result. That the INS must exercise *informed* discretion, *i.e.*, that it must have demonstrable cause to detain, is a constitutional and, as will be seen, a *statutory* prerequisite to the indefinite incarceration of children.

III THE INS'S BLANKET DETENTION OF CHILDREN EXCEEDS ITS AUTHORITY UNDER THE INA.

The foregoing has shown that the INS's detaining children without regard to whether such treatment is

²⁶ See pp. 25 - 28, *ante*.

²⁷ The referenced documents were disclosed pursuant to the Freedom of Information Act by the Executive Office of Immigration Review, an entity within the United States Department of Justice. Appendix 4. Their accuracy can be readily verified from the agency's official records, a source "whose accuracy cannot reasonably be questioned." Accordingly, they should be judicially noticed. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977).

at all necessary is unconstitutional.²⁸ From the outset of this cause, respondents have consistently argued that the INA can and should be reasonably construed so as to avoid these constitutional problems. App. 80a. So construed, the INS's blanket detention policy is not a valid exercise of the statutory discretion Congress conferred upon it. Although the *en banc* court of appeals did not address this statutory claim, this Court can and should resolve this case in

²⁸ In addition to denying due process, the INS's detention practices also discriminate in two ways against respondent children in arguable violation of the equal protection guarantee of the fifth amendment.

First, the INS's regulation divides children arrested for possible deportation into two classes: (1) children whose close blood relatives come for them; and (2) children for whom no such relative appears but for whom an extended family member or other responsible adult is willing to appear. As has been seen, such a classification lacks any rational connection to the likelihood that a child will be harmed or neglected following release. In any event, discrimination in providing basic procedural protection against needless "protective" incarceration cannot withstand the heightened scrutiny this Court has applied in reviewing any other deprivation of personal liberty. "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason ... for such discrimination..." *Foucha v. Louisiana*, ___ U.S. ___, 60 U.S.L.W. 4359, 4363 (1992).

Second, the federal government generally endeavors to ensure that a given child—even if that child is an alien—is not needlessly incarcerated. 18 U.S.C. § 5034 (requiring hearing before federal magistrate to determine whether child should be released). The Government reserves blanket "protective" detention for minors taken into custody by the INS. Because the INS justifies the automatic detention of children solely as a means to protect them, the underlying assumption is that children are more likely to be harmed when released to extended family members or child welfare programs because they have been arrested for deportation rather than delinquency. Such a classification is palpably irrational.

respondent's favor on statutory grounds alone. See *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

The INS's authority to detain suspected deportable aliens is contained in 8 U.S.C. § 1252. As this Court has observed, § 1252 places no express limits on the Attorney General's authority to detain because Congress deemed general rules about who should or shouldn't be detained unworkable. *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (decision to detain must be made on facts of individual case because "purpose to injure could not be imputed generally to all aliens subject to deportation...").

In *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, ___ U.S. ___, 112 S.Ct. 551 (1991), the Court reaffirmed the agency's statutory obligation to exercise discretion to detain on the facts of an individual case. In *National Center*, the INS argued that it had authority to condition a deportable alien's release on bond on his or her refraining from unauthorized employment. This Court upheld the regulation only because there the INS made "an initial, informal determination whether the alien holds some status that makes work 'authorized.'" 112 S.Ct. at 559.

We agree that the lawful exercise of the Attorney General's discretion to impose a no-work condition under § 1252(a) requires some level of individualized determination. Indeed *in the absence of such judgments, the legitimate exercise of discretion is impossible in this context.* ...

112 S.Ct. at 558-59 (emphasis supplied).

In contrast to *National Center*, the INS here argues that it is empowered to *automatically* detain children without any individualized exercise of discretion. This is expressly inconsistent with the principle of informed discretion articulated in *Carlson* and

National Center, yet the agency offers no reason to abandon this principle in this case. To the contrary, this case presents compelling reasons for reaffirming the Court's prior construction of § 1252.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score...." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933); accord *Public Citizen v. U.S. Dept. of Justice*, _ U.S. _, 109 S.Ct. 2558, 2566 (1989). In construing a statute that could impair an important constitutional right, this Court has placed special emphasis on this axiom of statutory construction, holding that there must be an "affirmative intention of the Congress clearly expressed" that such is the legislature's intent. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 506, (1979) (emphasis supplied).

Under our Constitution, "to the extent consistent with orderly governmental administration ... important choices of social policy [must be] made by Congress, the branch of our government most responsive to the popular will..." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring). This principle has repeatedly caused this Court to give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. U.S.*, 488 U.S. 361, 109 S.Ct. 647, 655 n.7 (1989) (collecting cases).

Construing § 1252 as requiring an individualized determination of cause to detain is the only reading which is consistent with the important policy choices Congress has made in the area of child welfare. After all, if Congress thought children should be detained indefinitely for want of an available close blood relative it would have no difficulty in making a hard-and-fast rule to that effect.

In conclusion, this Court has consistently read § 1252 as requiring that the INS exercise individualized discretion where it would detain persons it has not yet shown are either aliens or deportable. This result is faithful to Congress's intent that detention under the INA be applied flexibly in the public interest. The flexibility Congress sought to foster can only be preserved if the INS is required to exercise its discretion on the merits of an individual case. Reading § 1252 as requiring the INS to determine whether detention is in fact warranted for a given child is consistent with this Court's prior decisions, and this Nation's historic regard for personal liberty. For its part, the INS offers no sound reason for any other result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1992

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-905

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. Respondents and their *amici* devote a considerable portion of their various submissions (*e.g.*, Resp. Br. 10-14; ABA Amicus Br. 11-12; Child Welfare League Amicus Br. 2-3; Southwest Refugee Rights Project Amicus Br. 14-20, 24-33) to their allegations that INS has detained juveniles in facilities that do not comply with the standards required by the consent decree described at length in the petition and our brief on the merits, Pet. 6-8; Gov't Br. 11-13. As we explained in our reply brief at the petition stage and in our brief on the merits (see Reply Br. 3-4; Gov't Br. 32 n.31), those allegations are irrelevant to the issues before the Court. Before entry of the order challenged in this case, INS voluntarily consented to the entry of a binding judicial decree (Pet. App.

148a-205a) setting forth detailed standards for the juvenile-care facilities and requiring INS, "except in unusual and extraordinary circumstances" defined in the decree, to "house all juveniles detained more than 72 hours following arrest in a facility that meets or exceeds [those] standards," *id.* at 148a-149a. If respondents wish to contend formally that INS has failed to comply with the consent decree, they should initiate proceedings in the court that entered that decree.¹ If the district court concludes that INS has violated the decree, it is fully empowered to require INS to comply with it.

The legal question posed by the government's appeal to the Ninth Circuit, and its petition in this Court, is not whether the government has complied with the consent decree, but whether the district court erred in entering an additional order requiring INS—even if it complies with the consent decree—to release unaccompanied alien juveniles to unrelated adults. Because INS already had agreed to alter the conditions of confinement at the time the challenged order was entered, the conditions of confinement relevant to the challenged order are the conditions the consent decree requires INS to maintain.² Accord-

¹ As of July 25, respondents have not yet commenced any such proceeding. To the extent some of respondents' *amici* contend (see Southwest Refugee Rights Project Amicus Br. 14-20, 24-33) that INS has failed to adhere to the requirements of the consent decree with respect to aliens outside the Western Region (and thus not members of the class covered by the consent decree or this case), their remedy is to institute litigation in the appropriate district court.

² For this reason, respondents' repeated references to INS "jails," *e.g.*, Resp. Br. 5, and to INS's alleged practice of "jailing" juveniles, *e.g.*, *id.* at 9, 25, are inapposite.

ingly, the constitutional question before this Court is whether INS's policies are sufficient to justify detention under those conditions.

2. On the merits, respondents effectively concede that the framework set forth by *Schall v. Martin*, 467 U.S. 253 (1984), would provide sufficient constitutional protections even if this case involved citizens, see Resp. Br. 21, and acknowledge that under *Schall*, "the range of governmental interests justifying restraints on liberty, in the case of children, includes a *parens patriae* interest in caring for and protecting those who 'are not assumed to have the capacity to take care of themselves.'" Resp. Br. 22 (quoting *Schall*, 467 U.S. at 265).³ For several reasons, however, they contend that the result reached by the

³ Respondents suggest at several places that the *Schall* framework requires courts to consider whether the deprivation of liberty has been "narrowly tailored" to minimize infringement. *E.g.*, Resp. Br. 16, 17, 22. But the main issue in dispute here, as in *Schall*, is whether the purpose with which the government justifies the detention is legitimate, not whether the detention is adequately related to that purpose; respondents have not identified any way in which the policy leads to detention of juveniles in a way not required by the substantive policy judgment that an alien minor should not be released to an adult who is neither a parent nor a guardian. Hence, we do not believe that respondents' formulation accurately describes the standard. Narrow tailoring is a requirement in cases where the government is infringing on a fundamental right; as the Court explained when it considered similar constitutional claims in *Schall* and *United States v. Salerno*, 481 U.S. 739 (1987), if detention rests on a legitimate purpose consistent with fundamental fairness, then the detention does not infringe on a fundamental right. Hence, there is no need for narrow tailoring. We note that none of this Court's opinions in *Schall*, *Salerno*, or *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992), refers to a narrow tailoring requirement.

Ninth Circuit (if not that court's analysis) is nevertheless correct.

a. The heart of respondents' argument is the claim (Resp. Br. 22-28) that the detention at issue in this case is unconstitutional because it "serves no legitimate governmental interest." *Id.* at 22. To make that claim, however, respondents must assert (without supporting citation) that "INS largely concedes" that the interest supporting the detention is "really * * * administrative convenience." *Ibid.* Respondents then proceed to argue that administrative convenience is not a permissible basis for prolonged detention. *Id.* at 22-23. The problem with that argument, however, is that administrative convenience is not the reason for the detention. As our brief on the merits explains in detail, and as respondents themselves acknowledge in other portions of their brief (*e.g.*, *id.* at 22), the articulated basis for the detention is that it "further[s] the government's interest in ensuring the welfare of the juveniles in its custody," Gov't Br. 18; see *id.* at 26 n.27 (describing Federal Register notice ascribing that purpose to the challenged regulations).

As noted above, respondents concede that this interest would be sufficient to justify some restraints on the liberty of juveniles. They nevertheless attempt to avoid the necessity of explaining why that interest is inadequate in this case by arguing that INS's interest in furthering juvenile welfare does not in fact support the policy because INS has a "blanket" policy that requires detention "without *any* factual showing that detention is necessary to ensure respondents' welfare." Resp. Br. 28. Thus, respondents reason, the only remaining interest on which INS can rely is administrative convenience. That argument, however, represents nothing more than a policy disagreement, because it criticizes INS for failing to pursue

a view of juvenile welfare that INS has not adopted, namely the view held by respondent: that it is better for alien juveniles to be released to unrelated adults than to be cared for in suitable, government-monitored juvenile-care facilities, except in those cases where the government has knowledge that the particular adult seeking custody is unfit. The policy adopted by INS, reflecting the traditional view of our polity that parents and guardians are the most reliable custodians for juveniles, is that it is inappropriate to release alien juveniles—whose troubled background and lack of familiarity with our society and culture, see Gov't Br. 12 n.16, give them particularized needs not commonly shared by domestic juveniles—to adults who are not their parents or guardians.⁴ This is a "blanket" policy only in the

⁴ Respondents suggest in several places (see, *e.g.*, Resp. Br. 18, 40, 44 n.28) that INS's policy judgment on this score conflicts with the policy judgment Congress made in the provisions of Title 18 that in some cases allow the release of juveniles to unrelated adults. As we explained in our brief on the merits, see Gov't Br. 30 n.30, those provisions are inapplicable to this case, which involves aliens in INS custody on charges of deportability, not juveniles in custody on criminal charges. The only policy judgment Congress has made in this area is to grant the Attorney General plenary discretion to determine whether detention is appropriate. See 8 U.S.C. 1252(a)(1). Moreover, the provisions on which respondents rely offer significant individualized protection to children released to unrelated adults by requiring the magistrate in such a case to appoint a guardian ad litem for the child. See 18 U.S.C. 5034. INS, of course, could not take such an approach in this case, because it lacks the capacity to appoint guardians. If an individual secures an appointment as a custodial guardian from the appropriate authority, INS regulations of course generally would allow release directly to that individual. See 8 C.F.R. 242.24(b)(1); Gov't Br. 9.

sense that it requires maintaining custody in all cases in which INS believes it is appropriate to maintain custody. The fundamental issue in the case, then, is whether that policy is sufficiently legitimate to accord with the constitutional norms applicable to the alien juveniles involved in this case. For the reasons set forth in our brief on the merits (Gov't Br. 23-33), we submit that it is.

b. Respondents also attempt to distinguish *Schall* and *United States v. Salerno*, 481 U.S. 739 (1987), by arguing (Resp. Br. 24-25) that the detention in this case is "two major steps beyond anything yet approved in this Court's jurisprudence." *Id.* at 24. First, they contend that the detention is unacceptable because it is "indefinite." *Ibid.* Even putting to one side the obvious fact that *Schall* and *Salerno* involved citizens, while this case involves aliens, we disagree. The detention at issue in this case does not continue beyond the time necessary for proceedings to deport the individual, and terminates sooner if the individual's relatives are located or a guardian is appointed. As noted in our brief on the merits, the time in INS-monitored custody is less than 30 days for the great majority of juveniles. See Gov't Br. 13 n.19. Hence, the duration of the detention is not substantially more indefinite than that upheld in *Salerno*, which involved detention of criminal defendants during the period from the time of their arrest through completion of their criminal trials. See *Salerno*, 481 U.S. at 747.⁵

⁵ To be sure, the protections of the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, do not apply in deportation proceedings, but 8 U.S.C. 1252(a) (1) does offer relief in habeas corpus proceedings in cases where "the Attorney General is not proceeding with such reasonable dispatch as may be war-

Second, respondents argue (Resp. Br. 24) that INS detains the juveniles "without the slightest procedural protection." As we have explained in great detail in our brief on the merits, that claim is wrong. See Gov't Br. 3-13 (describing the relevant INS procedures). Respondents correctly point out (Resp. Br. 24) that the juveniles will not have a hearing regarding the advisability of release if they indicate to INS officials, after consulting with responsible adults not affiliated with the government, that they do not wish to have a hearing, but that hardly supports respondents' claim that INS fails to afford "the slightest procedural protection."⁶

ranted by the particular facts and circumstances in the case of any alien to determine deportability."

⁶ Respondents argue at some length (Resp. Br. 28-33) that the constitutional issues in this case are unaffected by the fact that respondents are aliens, apparently because the case does not involve a statute granting or denying entry to a particular class of aliens. As we explained in our brief on the merits (Gov't Br. 24 & n.25), the "special judicial deference" appropriate for policy choices in the immigration context, see *Fiallo v. Bell*, 430 U.S. 787, 793 (1977), extends not just to Congress's exercise of legislative power, but also to the Executive's exercise of delegated power, see *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Similarly, judicial deference applies not only to policy choices associated with entry or exclusion, but to all matters involved in "the responsibility for regulating the relationship between the United States and our alien visitors." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

In this regard, we are puzzled by respondents' statement (without any supporting citation) that we "flatly concede that the policy at issue has nothing to do with our country's immigration policy in general, with the deportation process in particular, or even with children's status as alleged aliens." See Resp. Br. 29. The policy at issue manifestly involves all three of those concerns.

c. Respondents support their argument that INS's policy is unconstitutional by asserting that it is inconsistent with standards articulated in a variety of juvenile justice publications. See Resp. Br. 7-8 & n.7. For several reasons, these publications are not particularly probative. First, and most obviously, these standards represent nothing more than various views regarding appropriate public policy; there is little reason to believe that they define the limits the Due Process Clause imposes on juvenile policy.

Second, none of the publications on which respondents rely addresses the unique situation presented by unaccompanied alien juveniles, who have little or no familiarity with American culture or language; who are alone, with no homes or parents; and some of whom, because of the traumatic conditions of their home countries and their journey to this country, may have serious mental disorders, see Gov't Br. 12 n.16. The assumption underlying those publications—that it would harm delinquent or abused children to remove them from the home and community environment with which they are familiar⁷—is simply inapplicable to the juveniles involved here, who already are far from whatever homes they have known. Indeed, to the extent that the standards specifically address the somewhat analogous situation of out-of-state runaways, they provide some support for automatic, nondiscretionary retention of custody.⁸

⁷ See, e.g., National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* 302 (1980) [hereinafter *Juvenile Justice*] (noting that detention is disfavored because "removal of a child from his/her house * * * is often emotionally 'very painful' to the child").

⁸ See, e.g., *Juvenile Justice*, *supra*, at 461; Institute of Judicial Administration of the American Bar Association, *Stand-*

Third, all of the standards recognize a distinction between secure, jail-type facilities (characterized by barbed wire and steel bars) and less restrictive shelter-care facilities, in which open activity, recreational spaces, and appropriate care programs coexist with necessary controls and limitations, and agree that detention in shelter-care facilities can be appropriate in cases where detention in secure facilities would be inappropriate.⁹ Notwithstanding respondents' frequent reference to INS "jails," see note 2, *supra*, the facilities in this case resemble shelter-care facilities much more than they do highly restrictive secure facilities. See, e.g., Pet. App. 173a (provision of consent decree requiring the facilities to be operated "in an open type of setting without a need for extraordinary security measures").

3. Respondents also argue (Resp. Br. 33-43) that the existing procedures fail to accord them the process

ards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition 121 (1980) [hereinafter *Interim Status*]. But see Institute of Judicial Administration of the American Bar Association, *Standards Relating to Noncriminal Misbehavior* 50 (1982) [hereinafter *Noncriminal Misbehavior*] (indicating that involuntary restraint may be inappropriate for runaway juveniles); but cf. Department of Health, Education, and Welfare, *Model Acts for Family Courts and State-Local Children's Programs* 25-26 (1975) [hereinafter *Model Acts*] (requiring detained children to be released to any suitable custodian unless the child falls within one of four narrowly drawn exceptions).

⁹ See, e.g., *Interim Status*, *supra*, at 45-46, 50-52, 97-98; *Juvenile Justice*, *supra*, at 299, 301-302, 461-462; *Model Acts*, *supra*, at 26-27; *Noncriminal Misbehavior*, *supra*, at 55-56; National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 248, 257 (1973); National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act* 15-16, 25-26 (1968).

due to aliens under the Fifth Amendment. Their discussion has two central flaws. First, it inaccurately characterizes the determination to be made, and second, it inaccurately describes the procedures INS uses to make that determination.

a. At the heart of respondents' analysis of the procedural due process question is the assertion that there is a great "risk of erroneous deprivation * * * through the procedures used" by INS to determine whether juveniles should be released. See Resp. Br. 35-38 (applying the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). They support that assertion by arguing that INS cannot reliably determine without a hearing whether the juvenile is being deprived of liberty erroneously. That assertion, however, assumes the invalidity of INS's policy judgment that alien juveniles should not be released to adults who are neither their parents or guardians.¹⁰ If that policy judgment is valid (which is the first question in this case), then the procedures are adequate, because there is little risk that the existing procedures will lead to an erroneous determination that no parent or guardian is available to take custody of the juvenile.

¹⁰ Respondents' discussion of the validity of the procedures in light of that policy judgment (Resp. Br. 37-38) suffers from the same flaw, as they argue that "the Government has no interest in detaining a child who could be released safely," *id.* at 38 (emphasis in original). That argument, again, rests on the assumption that INS has erred in determining that a concern for juveniles' overall welfare militates against release of alien juveniles to adults who are neither their parents or guardians. Respondents support that assumption by stating that "[f]or years the INS has released children to responsible adults and shelter-care programs without incident." Resp. Br. 35. The record in this case is not adequate to support that statement.

b. Respondents also attempt to demonstrate the inadequacy of INS's procedures by making several misleading statements about those procedures. For example, respondents assert (Resp. Br. 37) that there is "no procedure by which a child may demonstrate entitlement to * * * release" under the "unusual and compelling circumstances" proviso in 8 C.F.R. 242.24(b)(4). That assertion is incorrect. The juvenile can seek release under that provision—or any other provision—in a hearing before an immigration judge under 8 C.F.R. 242.2(d), with review in the Board of Immigration Appeals and, ultimately, the federal courts. See Gov't Br. 7-8.

Similarly, respondents fault INS's procedures as relying on an expectation that juveniles "can be expected to ask for a hearing to review restrictions on their liberty." Resp. Br. 40. That argument, however, ignores several aspects of INS's procedures designed to result in hearings in cases where there is a serious claim that detention would be inappropriate. First, and most importantly, INS regulations require officers, before presenting any forms to the juvenile, to ensure that the juvenile "in fact communicate[s] with either a parent, adult relative, friend, or with an organization found on the free legal services list." 8 C.F.R. 242.24(g) and (h); see Gov't Br. 4-5. It is fair for INS to presume that those individuals will counsel the juvenile regarding the appropriate course of action. Second, INS procedures do not require the juvenile to take any complicated or sophisticated action in order to receive a hearing: the juvenile will receive a hearing unless he either checks a box specifically indicating he does not want a hearing, or refuses to complete the relevant form. See Gov't Br. 5-8.

* * * * *

Respondents have failed to show that principles of due process require INS to hold hearings on an unrelated adult's fitness to act as a child's custodian instead of deferring to determinations made under state law in guardianship proceedings. At bottom, INS reached the reasonable judgment that an unrelated adult who lacks the interest or qualifications to become a guardian under state law should not be given custody. On the other hand, any unrelated adult who does make that commitment and is found to be fit under state law will be given custody under INS regulations. There accordingly is no reason INS automatically must hold hearings on the parental fitness of unrelated adults. Respondents' contention (Resp. Br. 41) that children "cannot reasonably be expected to invoke such [guardianship] procedures from the confines of remote INS detention facilities" misses the point. It is the unrelated adults seeking to obtain custody who must institute such guardianship appointment proceedings, not the children, and not INS.¹¹

4. Respondents also claim (Resp. Br. 43-47) that the detention at issue in this case is invalid because

¹¹ Respondents also state without supporting citation that "children in INS detention [are] simply ineligible for guardianships." Resp. Br. 41. The record establishes only that the local courts in Los Angeles have expressed unwillingness to grant temporary guardianship to juveniles in INS custody; as we explained in our reply brief at the petition stage, those courts reached that decision in response to an abuse of temporary guardianship appointments pursuant to which temporary guardians appointed for alien minors typically failed to appear with their wards for permanent guardianship hearings. See Reply Br. 4 n.4. Moreover, nothing in the record suggests that the juveniles are ineligible for permanent guardianships or that the substantial portion of the juveniles outside of Los Angeles are ineligible for temporary guardianship proceedings.

it exceeds the authority granted to the Attorney General under 8 U.S.C. 1252(a).¹² That claim is meritless. Section 1252(a)(1) vests the Attorney General with broad discretion to determine whether aliens should be detained pending deportation:

[A]ny * * * alien taken into custody [on the basis of deportability] may, in the discretion of the Attorney General and pending [the] final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.¹³

As the Court explained last Term in *INS v. National Center for Immigrants' Rights (NCIR)*, 112 S. Ct. 551 (1991), whatever the outer bounds of the Attorney General's authority, any decision to detain that is "consistent with [an] established concern of immigration law" is "squarely within the scope of the Attorney General's statutory authority." *Id.* at 558. In this case, the decision to detain is based on concern for the welfare of the alien juveniles who

¹² Although respondents did not raise this issue in their brief in opposition to the petition for a writ of certiorari, the government has no objection to the Court's resolution of the issue, which was raised before and decided by the court of appeals, see Pet. App. 80a-93a.

¹³ The subsequent sentences of the provision reinforce the Attorney General's broad discretion by granting him broad discretion to revoke any bond or parole he may choose to grant, and by limiting the availability of judicial review except in cases where he is not "proceeding with * * * reasonable dispatch * * * to determine deportability." 8 U.S.C. 1252(a)(1).

come into the Attorney General's custody. Because concerns related to the welfare of aliens in the Attorney General's custody necessarily fall within the Attorney General's responsibility to detain and deport aliens, the regulation implements a statutorily permissible concern.

Respondents suggest, however, that *NCIR* requires the Attorney General to "exercise discretion to detain on the facts of an individual case." Resp. Br. 45 (emphasis omitted). To be sure, the Court in *NCIR* suggested that it would be improper to require "no-work" conditions in release bonds without "an initial, informal determination" as to whether the aliens were eligible to work. 112 S. Ct. at 559. But that suggestion required nothing more than that the Attorney General develop procedures to ensure that he did not detain aliens based on policies that did not apply to them, for example, by requiring "no-work" conditions in the bonds of aliens who lawfully could seek employment in this country. In this case, that rule would require "an initial, informal determination" as to whether the juvenile appears to be deportable and as to whether a parent or guardian is available to take custody. As we have explained at length, INS procedures provide for just such a determination. See Gov't Br. 3-10.¹⁴

¹⁴ Respondents suggest in passing that the policy in question violates "the equal protection guarantee" of the Fifth Amendment. See Resp. Br. 44 n.28. First, they argue that a policy allowing release to parents and legal guardians, but not to other adults, "lacks any rational connection to the likelihood that a child will be harmed or neglected following release." *Ibid.* It is sufficient to respond to that argument to point out that this country's long tradition of reposing custody

5. *Amicus* Amnesty International suggests (*Amnesty Int'l Amicus Br.* 11-13) that the policy at issue in this case is unlawful because it is inconsistent with the United Nations Convention on the Rights of the Child, U.N. G.A. Doc. A/44/736 (1989). That suggestion is incorrect, principally because, as Amnesty International acknowledges (*Amnesty Int'l Amicus Br.* 11 n.10), the United States has not ratified the Convention.¹⁵

over juveniles in either parents or duly appointed guardians provides adequate support for the distinction.

Second, respondents argue that it is "palpably irrational" to detain unaccompanied alien juveniles in INS custody when the federal government has procedures that permit release of juveniles arrested for juvenile delinquency to unrelated adults. Resp. Br. 44 n.28 (citing 18 U.S.C. 5034). Those procedures, of course, are not principally applicable to alien juveniles; moreover, those procedures require appointment of a guardian ad litem for an unaccompanied juvenile, who can ensure that the juvenile receives adequate care. See 18 U.S.C. 5034. INS does not have the capacity to appoint a guardian ad litem and thus rationally has chosen to defer to guardianship determinations made by state courts with expertise in such matters. See *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2215 (1992) (noting the "special proficiency developed by state tribunals over the past century and a half in handling" domestic relations issues). Hence, in light of the special needs of alien juveniles for whom no parent or guardian is available, it is rational for INS to conclude that care in special government-monitored facilities is appropriate.

¹⁵ Indeed, contrary to the representation in Amnesty International's brief (*Amnesty Int'l Amicus Br.* 11 n.10), the Office of the Legal Advisor of the Department of State has advised us that the United States has not even signed the Convention. See also *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* iv (Cynthia Price Cohen & Howard A. Davidson eds. 1990) [hereinafter *Children's Rights in America*] (noting that the United States had not signed the Convention as of 1990).

Moreover, even if the Convention were binding in the United States, it would cast no doubt on the legitimacy of INS's policy. The principal provision on which Amnesty International relies, Article 37(b), does not address the specific circumstances of this case, but generally provides: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time." *Reprinted in Children's Rights in America, supra*, at xxvi.¹⁶ As we have argued at length in our briefs in this case, the detention is neither unlawful nor arbitrary, but represents a reasoned exercise of the Attorney General's discretion to detain deportable aliens. Similarly, detention is used as a measure of last resort, when no parent or legal guardian is available. INS's decision to rely on parents and legal guardians as the legitimate caretakers of displaced children in fact resonates with the Convention's frequent reference to the State's duty to rely on those individuals.¹⁷

¹⁶ Amnesty International also suggests (Amnesty Int'l Amicus Br. 11-12) that INS's policy is inconsistent with the requirement set forth in Article 37(d) that States afford "the right to challenge the legality of the deprivation of [a juvenile's] liberty before a court or other competent, independent and impartial authority," *reprinted in Children's Rights in America, supra*, at xxvi. As described in detail in our brief on the merits, INS's procedures afford that right. See, e.g., Gov't Br. 7-8.

¹⁷ See, e.g., Article 14.2, *reprinted in Children's Rights in America, supra*, at xvi ("States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child."); Article 18.1, *reprinted in id.* at xviii ("Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child."); Article 18.2, *reprinted in*

Similarly, the Convention recognizes the legitimacy of INS's interest in caring for unaccompanied alien juveniles, by providing that "[a] child temporarily or permanently deprived of his or her family environment * * * shall be entitled to special protection and assistance provided by the State." Article 20.1, *reprinted in Children's Rights in America, supra*, at xviii. In fact, the Convention provides that States must "ensure alternative care for such a child," Article 20.2, *reprinted in id.* at xix, and states that "[s]uch care could include, *inter alia*, foster placement, * * * or if necessary placement in suitable institutions for the care of children," Article 20.3, *reprinted in ibid.*¹⁸ INS's procedures are fully consistent with those provisions.

For the foregoing reasons and those set forth in our brief on the merits, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
Solicitor General

JULY 1992

ibid. ("States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.").

¹⁸ Moreover, the aspects of the consent decree that require the care to be "accomplished in a manner which is sensitive to culture, native language and the complex needs of these minors," Pet. App. 157a, ensure that the facilities satisfy the obligation, recognized by the Convention, to pay "due regard * * * to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background," Article 20.3, *reprinted in Children's Rights in America, supra*, at xix.

JUN 29 1992

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U.S. SUPREME COURT

In The
Supreme Court of the United States
October Term, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, et al.,

Petitioners,

vs.

JENNY LISETTE FLORES, et al.,

Respondents.

On Writ Of Certiorari To The
Court Of Appeals For The Ninth Circuit

**BRIEF FOR SOUTHWEST
REFUGEE RIGHTS PROJECT, IMMIGRANT
LEGAL RESOURCE CENTER, AND THE
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE

Amici seek to secure the protection of immigrant children's right to liberty, and ensure that the Court understands the abhorrent conditions faced by children detained by the Immigration and Naturalization Services ("INS") while they await deportation hearings. The government's claimed interest in protecting the welfare of children is not served by incarcerating them -- often for indefinite periods of time -- in INS detention facilities, but by allowing children to be released to relatives or to other responsible adults willing to care for them pending their hearings. It is for these reasons the amici curiae have a substantial interest in this case.

The Southwest Refugee Rights Project is a joint project with the Tucson Ecumenical Council Legal Assistance ("TECLA"), Tucson, Arizona, and the Central American Refugee to Central Americans, Los Angeles, California. The Southwest Refugee Rights Project works directly with children and adults detained at various INS facilities in the Southwest.

Immigrant Legal Resource Center ("ILRC") is a public interest immigration law organization that provides counseling, training, and educational materials to non-profit organizations and agencies that assist or represent indigent immigrants. In addition, the ILRC provides legal representation to a number of immigrants. The ILRC and the several groups it advises advocate on

behalf of non-citizen children in INS detention, both in California and Texas.

The Mexican American Legal Defense and Educational Fund ("MALDEF"), established in 1967, is a national civil rights organization headquartered in Los Angeles. One of its principal objectives is to secure, through litigation and education, the civil rights of Latino immigrants in the United States. Towards this end, MALDEF has helped to ensure the rights of undocumented children in such cases as Plyler v. Doe, 457 U.S. 702 (1982).

These parties have consented to the filing of this brief pursuant to Supreme Court Rule 32.

SUMMARY OF ARGUMENT

Despite the abhorrent conditions of detention facilities, the INS has

maintained a policy of detaining children who could be released to responsible adults or child welfare agencies. These children have committed no crime, pose no danger to society or to themselves and are forcibly detained indefinitely as they await the determination of their immigration proceedings. Each of these children has a responsible adult willing to accept custody and provide care, but because INS maintains its blanket policy of incarceration, the caretakers are not permitted to demonstrate their fitness and these children are relegated to imprisonment. The blanket detention policy violates the children's due process rights and is detrimental to the children's general welfare.

The children have a liberty interest expressly protected by the Constitution.

The individual child's interest in liberty outweighs any asserted interest the government may have in maintaining its blanket policy of detaining these children for indefinite periods of time. While the INS raises as its purported justification for this policy its concern for the general welfare of the children, in fact its failure to make individualized determinations regarding the release of an individual child is motivated by little more than the agency's administrative convenience.

The INS's contention that the children are better served by detention than by release to a responsible adult is not supported by the very harsh realities of the conditions of these detention facilities. Moreover, INS's position disregards all child welfare expert

opinion and the congressional policy embodied in federal juvenile justice laws that incarceration does not as a general rule promote the best interests of the child. The Due Process Clause mandates that there be individualized determinations concerning the continued detention of the child.

ARGUMENT

I. THE CHILDREN'S LIBERTY INTEREST EXPRESSLY PROTECTED BY THE CONSTITUTION OUTWEIGHS ANY ASSERTED GOVERNMENTAL INTEREST IN MAINTAINING A BLANKET POLICY OF DETAINING CHILDREN BEFORE DEPORTATION HEARINGS.

Amici concur fully with the legal analysis articulated by Respondent children. An individual's liberty interest in freedom from institutional restraints is a right protected under the Due Process Clause. Foucha v. Louisiana, 60 U.S.L.W. 4359 (U.S. May 18, 1992) (No.

90-5844); Youngberg v. Romeo, 457 U.S. 307, 316 (1982). This right is applicable to all individuals in the United States regardless of their age or immigration status. See In Re Gault, 387 U.S. 1, 13 (1967); Mathews v. Diaz, 426 U.S. 67, 77 (1976).

In determining the constitutionality of governmental restrictions on liberty, the Court must assess the legitimacy and strength of the government's interest and then must balance "the individual's interest in liberty against the [government's] asserted reasons for restraining individual liberty." Youngberg v. Romeo, 457 U.S. at 320. The INS maintains that the child's interests would be better served by incarceration than by release to a responsible adult. See Brief for the Petitioners at 27

("Pet. Br."). As discussed below, the terms and conditions of the children's confinement belie the government's alleged interest in the children's welfare. Rather than a concern for the general welfare of the children, the INS's true interest in refusing to release these children to unrelated adults without individualized determinations as to responsibility of the adult is mere administrative convenience. The blanket refusal to make individualized determinations in the guise of administrative expediency, however, cannot pass constitutional muster. See Reed v. Reed, 404 U.S. 71, 76-77 (1971) (administrative convenience does not justify a policy that otherwise runs afoul of the Constitution). The position of the INS in this litigation --

that detention of children in INS jails is safer and better for the children than release to a non-immediate relative or an adult who is willing to assume responsibility for the child -- is directly contrary to the consensus of opinion from those with great expertise in children's welfare issues. See 171 Clerk's Record 553 ("CR").

In addition, INS's policy favoring institutionalization stands in stark contrast to federal laws governing detention of federal youth offenders. There is a congressional policy strongly disfavoring institutionalization. See Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5034; 5035; 5039 (federal magistrate shall release children to parents, guardian or other responsible party).

In comparison to the cases where the Court has found the governmental interests sufficient to overcome the individual's substantial interest in freedom from detention, INS's proffered reasons here ring hollow. For instance, in U.S. v. Salerno, 481 U.S. 739 (1987), this Court recognized that the government's legitimate and compelling interest in detaining for strictly limited periods of time arrestees whom the government had individually determined posed an identified and articulable threat to an individual or the community outweighed the arrestee's liberty interest. See also Schall v. Martin, 467 U.S. 253, 264 (1984) (state has legitimate and compelling state interest in protecting the community from crime and children from possible injury

while committing a crime to justify brief detention after individualized determination). In this case, INS seeks to justify the blanket pre-hearing detention of children who it admits present no threat to themselves or to the community. Pet. Br. at 3. Nor does the government contend that the detention is justified because these children pose any risk of flight.

Even if the government demonstrates valid reasons for restraining an individual's liberty, the government must also convince the Court that its detention policy is reasonable and not excessive in light of the individual's liberty interest. Youngberg v. Romeo, 457 U.S. at 322; Schall, 467 U.S. at 269. The INS cannot meet that standard because of the blanket nature of its policy.

Because this blanket policy automatically categorizes unrelated adults as unfit to take custody of a minor, and has no procedure to show such fitness, the detention policy is, on its face, excessive for its asserted purpose. This Court has unequivocally found constitutionally justifiable only those statutes which have adequate procedural safeguards. Salerno, 481 U.S. at 751 (statute required full adversarial hearing to convince neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person); Schall, 467 U.S. at 277 (pre-trial detention of juvenile permitted based upon finding of serious risk that

child may commit crime).¹

Indeed, the "significant interest" of the children in their liberty in Schall was protected by a prompt, impartial, and individualized determination of the need for their detention. This is precisely what both the district court and the court of appeals held to be appropriate to guarantee that these children do not languish incarcerated through no fault of their own.

¹The detentions found permissible by this Court, unlike those faced by the children in INS custody were all strictly limited in time. See U.S. v. Salerno, 481 U.S. 739, 747 (1987); Schall v. Martin, 467 U.S. 253, 269 (1984). Indeed, this Court has recently stricken as unconstitutional a statute permitting indefinite confinement in a mental facility. Foucha v. Louisiana, 60 U.S.L.W. 4359, 4362 (U.S. May 18, 1992) (No. 90-5844).

II. EVEN UNDER INS'S ANALYSIS, THE COURT SHOULD FIND THAT THE CONDITIONS OF DETENTION EXISTENT AT THE TIME THE CASE WAS BROUGHT WERE PUNITIVE AND EXCESSIVE IN RELATIONSHIP TO INS'S STATED PURPOSE OF ENSURING THE CHILDREN'S WELFARE.

Even if INS could demonstrate that it seeks to promote a legitimate interest in ensuring the welfare of children, this Court must determine whether the "terms and conditions of confinement are . . . in fact compatible with those purposes." Schall, 467 U.S. at 269. The Constitution does not, under these circumstances permit the imposition of conditions which are punitive. Id. See also Foucha v. Louisiana, 60 U.S.L.W. at 4362-4363. The conditions of confinement for children in detention are severe and excessive.

The record before the district court and this Court is replete with examples

of the abhorrent conditions endured by children in INS detention centers. For example, at the time this action was brought, INS maintained a policy of routinely strip searching children who had been detained for violating immigration laws, both upon their admission to INS detention facilities and after visits with non-attorneys. The district court, on a summary judgment motion, found that this strip search policy violated the children's Fourth Amendment rights absent a reasonable suspicion that the search would yield weapons or contraband. Flores v. Meese, 681 F. Supp. 665, 669 (C.D. Cal. 1988).

In addition, children in INS detention were routinely forced to share sleeping quarters, bathrooms, and other common areas with unrelated adult

prisoners of both sexes. At the Eclectic Communications, Inc., in El Centro, California, with whom INS contracts for children detention services, young unaccompanied boys were mixed with adult women. 159 CR 351. Children and adults shared the same unpartitioned showers. Adult women and children shared the same toilets, which also lacked partitions and provided no privacy. Id. at 353. There were no physical barriers between the male and female sleeping areas at INS detention facilities in Hollywood, California, 77 CR 686, or Inglewood, California. 160 CR 356-57. Similar practices prevailed at still other facilities. Id. at 271.

Children in INS jails were routinely denied the right to visit with their families and friends. Children

incarcerated at the Casa San Juan facility in San Diego, California were barred from ever seeing their family members while in detention. 163 CR 1070. At the Staging Area in San Diego, the INS never told the children detainees that they could receive visitors. 160 CR 311.

The INS conceded that incarcerated children receive few or no educational services or reading materials. The vast majority of children in INS detention received no educational instruction at all because, as a top INS official put it, "[i]t is not [an INS] function. It would be costly." 76 CR 403. The INS admitted that seven of the twelve facilities in which minors were most often held provided youngsters no educational instruction whatsoever. Those facilities accounted for over 64

percent of all detained juveniles. 78 CR 1159.

Children in INS detention have had little or no recreation. As one INS jailer testified, children in his facility could only "play in the dirt," or go out in the desert summer "and let their tongue[s] hang out in the heat." 159 CR 201.

A majority of the Central American minors detained by INS have experienced traumatic events, such as rape, physical assault, forcible removal from their homes, or forcible recruitment into a combatant group. A study of Central American minors documented Post-Traumatic Stress Disorder ("PTSD"), depression and suicidal tendencies to be customary disorders exhibited by children held in

INS detention centers.²

INS detention facilities are for the most part, incapable of diagnosing, let alone appropriately dealing with children suffering psychological disorders. According to a report published in May of 1992 by Americas Watch, an organization which monitors and reports on the status of human rights, the INS has sent children displaying symptoms of PTSD to juvenile halls where they receive little or no psychological care. In the case of Jesús, a 15-year-old Guatemalan who exhibited bizarre and sometimes disruptive behavior, INS reacted by

²Rodriguez and Urrutia-Rojas, Undocumented and Unaccompanied: A Mental Health Study of Unaccompanied Immigrant Children from Central America, University of Houston, 1990, at 58-59, Appendix to Brief Amicus Curiae of Immigrant, Refugee and Civil Rights groups, Exhibit 1 (Appendix to Amicus Brief, Ninth Circuit).

transferring him from one facility to another, including to juvenile halls hundreds of miles from his attorney, and to an adult detention center where he was shackled to his bed.³

Based on the factual record before the Court, the conditions for children in detention were punitive and excessive because the children's health and welfare were being seriously injured.

III. EVEN IF IT WERE APPROPRIATE FOR THIS COURT TO MAKE A DETERMINATION BASED ON DETENTION CONDITIONS AS THEY EXIST TODAY, THE GOVERNMENT'S MISREPRESENTATIONS MANDATE THAT THIS

³Human Rights Watch, Brutality Unchecked: Human Rights Abuses Along the U.S. Border with Mexico: An Americas Watch Report at 73 (1992) (Brutality Unchecked) (citing Letter from Edward J. Flynn, attorney, to Omer Sewell, INS district director, dated July 12, 1989; Rebecca Thatcher, "Teen aliens reported shackled to beds," The Brownsville Herald, July 23, 1989.).

COURT REMAND TO THE DISTRICT COURT TO MAKE APPROPRIATE FINDINGS.

Petitioners contend with no substantiation that current conditions are precisely as set forth in the settlement agreement reached by the parties in 1987. Petition for Writ of Certiorari ("Petition") at 6-8 and 21, (Pet. Br.) at 11-13 and 32 n.31.⁴ They contend that the Community Relations Service has, on INS's behalf, "implemented a detailed program designed to further every significant aspect of the child's welfare." Petition at 21. Yet Petitioners cite no evidence to support this contention. In fact, there

⁴The settlement called for the INS to reform detention conditions as specified in the settlement beginning no later than June 1, 1988. See Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, No. 85-4544-RJK (Px) (C.D. Cal. Nov. 30, 1987) at 2., Petitioners Appendix 148a-205a.

is no evidence in the record to support their dubious contention.

It is proper, and in fact obligatory, for Petitioners to apprise the Court of new developments. Fusari v. Steinberg, 419 U.S. 379, 390 (1975) (Burger, C.J., concurring). However, in addition to advising the Court of the settlement, they have asked the Court to assume that they have fully complied with its terms. This is asking too much.

It would be more appropriate to allow additional evidence to be heard by the trial court. Where, as here, findings are inadequate, the case should be remanded to permit taking of additional evidence, if offered, and to make findings and conclusions as required by Rule 52 of the Federal Rules of Civil Procedure. Woods Const. Co. v. Pool

Constr. Co., 314 F.2d 405 (10th Cir. 1963). See also Girard Trust Co. v. Windt, 178 F.2d 359 (2d Cir. 1949) (cause remanded with instructions to make essential findings and to hear any additional evidence that the parties might offer where the evidence was conflicting and unsatisfactory, and the court had not made findings covering all matters at issue).

Petitioners assert that the INS not only has fully implemented the agreement, but that it also "generally has adhered to the policies set forth in Child Care Memorandum on a nationwide basis."⁵ Pet. Br. at 11 n.15 (emphasis added).

⁵This is a reference to the "Alien Minors Shelter Care Program - Description and Requirements," (April 28, 1987), which is incorporated by reference into the settlement agreement. Memorandum of Understanding at 2. See Pet. App. 148a-205a.

See also Petition at 7 n.8 ("Although the decree by its terms governs only the Western Region, INS practices throughout the country generally follow the terms of the decree."). As organizations with particular knowledge of INS detention practices and conditions, amici wish to inform the Court that this description of current conditions is grossly inaccurate. Amici wish to avoid the manifest injustice that would occur were the Court to assume the accuracy of Petitioners' description and rely on such an assumption to support a ruling in this case.

In fact, INS's own records indicate that it has failed to implement the settlement agreement. See INS's contract with the Cochise County Children's Center

in Huachuca City, Arizona at Appendix 1.⁶

The contract, which contains only four pages of text, fails to refer to the settlement agreement. The contract by its terms fails to provide for family reunification services, comprehensive needs assessments, recreational and educational services, access to religious services, and counseling -- all elements of the settlement agreement which

⁶Intergovernmental Service Agreement Between Chochise County Child Center [. . .] Huachuca City, Arizona and U.S. Department of Justice Immigration & Naturalization Service [. . .], Western Regional Office, Laguna Niguel, California for Detention of US INS Prisoners by the Chochise County Child Center (Effective Sept. 1, 1990) (Errors in the original reprinted).

This contract was disclosed by the INS pursuant to the Freedom of Information Act, 5 U.S.C. § 552. As an official agency record, the contract may be judicially noticed. See Massachusetts v. Westcott, 431 U.S. 322, 323 n.2 (1977) (Court judicially notices fact that respondent held a fishing license).

Petitioners claim to this court to have implemented. Pet. Br. at 11-13 and n.15; Petition at 7-8.

Other sources, including documents in the public record, contradict INS's allegations regarding current conditions in the detention center. These sources further demonstrate that, at the very least, Petitioners' assertions raise substantial questions of fact.

For example, one of the primary contentions underlying Petitioners' assertion that detention conditions are nonpunitive is that, rather than being kept in correctional institutions, children are placed within 72 hours of apprehension in "special child-care facilities supervised by the Department of Justice." Pet. Br. at 2-3. According to Petitioners, these facilities are

"specially designed to deal with the complex needs of unaccompanied alien juveniles . . ." Pet. Br. at 20.

In fact, INS freely and routinely places minors in juvenile correctional facilities. Brutality Unchecked at 71. Hearings conducted by a California legislative committee in July of 1990 contain testimony attesting to the detention of minors by INS at two juvenile halls in California. See California Legislature, Joint Committee on Refugee Resettlement, International Migration and Cooperative Development, "Joint Interim Hearing On Impact of INS Policies and Reforms," (July 19, 1990), Transcript at 29, ("Joint Interim Hearing") Flores v. Meese, No. 88-6249 (9th Cir. filed 1988) (Brief Amicus Curiae of Immigrant, Refugee and Civil

Rights groups, Ninth Cir., March 1, 1991, (Appendix to Amicus Br., Ninth Cir.), Exhibit 14. Accounts in various periodicals have similarly reported INS's detention of minors at juvenile justice facilities in recent years. See e.g., "Los Lunas Detains Illegal Teen Immigrants," Albuquerque Tribune, April 6, 1989; "Jailing of Juveniles for INS Criticized," Albuquerque Tribune, May 10, 1989; "For Salvador's Kids, Yuma is Hell," Tucson Citizen, Nov. 17, 1989, see App. to Amicus Br., Ninth Cir., Exhibits 7, 8, 12.

The Americas Watch report refers to INS's detention of minors at the Yuma County Juvenile Court Center in Arizona, the Santa Cruz County Juvenile Detention Center in Arizona, and the Imperial County Juvenile Hall in California. The

report states that in juvenile justice facilities:

youths detained by the INS are grouped together with youths accused of crimes. In recent years, the INS has detained hundreds of youths at such facilities At the Yuma County Juvenile Court Center in Arizona, minors in INS custody are required to wear uniforms and sit quietly at a table most of the day. They are under constant surveillance by a guard. The facility employs no caseworkers, has no family reunification program, and has no meaningful recreational or educational activity.

Brutality Unchecked at 71. The report also concludes that juvenile justice facilities used by INS ignore court orders applicable to individuals in INS custody, including the order of the district court below banning routine strip searches of undocumented minors, Flores v. Meese, 681 F. Supp. 665, 669

(C.D. Cal. 1988).⁷ Brutality Unchecked at 72. For example, in April of 1992, a 15-year-old Guatemalan boy was subjected to a strip search at the Santa Cruz County Juvenile Detention Center in Nogales, Arizona where he was held overnight. "The Yuma County Juvenile Court Center also continued to routinely strip-search undocumented minors long after the federal court decision" in this action. Brutality Unchecked at 72.

The articles cited supra at 29 detail similarly stark, harsh detention conditions. These accounts cast doubt on, or at least place in dispute, INS's bald assertions that it ceased using juvenile justice facilities upon entering into the settlement agreement and has

⁷The government did not appeal this order.

since then provided children with the special services detailed in the agreement.

Conditions at other types of contract facilities used by INS also cast serious doubts upon Petitioners' contention that INS has fully implemented the settlement agreement. A private facility used by INS in Imperial, California to detain minors was criticized for severe abusive disciplinary practices, including the use of handcuffs and shackles, forced exercise, and lengthy confinement to a punishment room in hearings before California's State Legislature. Joint Interim Hearing at 4, 21. In addition, four INS officers were sued for beating and psychologically abusing minors at the facility during separate incidents in

1990. Garcia v. United States, CV 91-0908-GT (S.D. Cal. filed 1991).

Furthermore, while Petitioners correctly state that the settlement agreement requires INS to provide children with education in six basic areas by state-certified teachers in a structured classroom setting, (Pet. Br. at 13) the Americas Watch report found that this has not been done. Brutality Unchecked at 72. Educational programs at INS facilities do not offer the full range of subjects specified in the agreement. Indeed at one particular facility where classes were taught by an uncertified teacher, instruction was held only three hours per day, and sometimes classes were not held at all. Id.

While the Court may properly acknowledge that INS has bound itself to

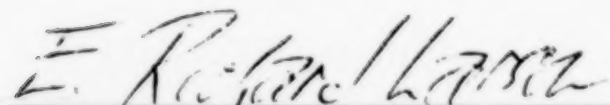
improve the deplorable conditions which existed at the time this case was filed, it would be inappropriate for the Court to assume that conditions have actually improved. If this Court should decide that current conditions in the detention facilities are relevant to its determination of the constitutionality of the policy, the Court should remand to the district court for further findings of fact. See, Patterson v. Alabama, 294 U.S. 600, 607 (1935) (remand appropriate where change in circumstances arising since judgment has bearing on the disposition).

CONCLUSION

Amici curiae in support of Respondent children respectfully request that this Court affirm the decision

below, finding a violation of the children's due process rights by Petitioners, or in the alternative, direct that this remanded matter be to the district court for further findings of fact.

RESPECTFULLY SUBMITTED this 29th day of June, 1992.



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No. 91-905

In The
Supreme Court of the United States
October Term, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, et al.,

Petitioners,

vs.

JENNY LISETTE FLORES, et al.,

Respondents.

On Writ Of Certiorari To The
Court Of Appeals For The Ninth Circuit

APPENDIX TO BRIEF FOR SOUTHWEST
REFUGEE RIGHTS PROJECT, IMMIGRANT
LEGAL RESOURCE CENTER, AND THE
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS

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Intergovernmental Service Agreement

Between

Chochise County Child Center
P.O. Box 4338
Huachuca City, AZ 85616

and

U.S. Department of Justice
Immigration & Naturalization Service
Western Regional Office
P.O. Box 30080
Laguna Niguel, CA 92607-0080

For

Detention of US INS Prisoners by the

Chochise County Child Center

Agreement Number: WRO J-031

Effective Date: September 1, 1990

INTERGOV.AGR.

Immigration & Naturalization Service
Agreement ScheduleArticle I - Purpose

The purpose of this Intergovernmental Service Agreement is to establish a formal binding relationship between the U.S. Immigration & Naturalization Service (USINS) and the Chochise County Child Center for the detention at the Chochise County Child Center of persons found to be in violation of the Immigration & Nationality Act and related criminal statutes.

Article II - Covered Services

The housing, safekeeping, and subsistence of USINS detainees in accordance with the contents of this agreement. The unit of service will be the Detained Day and the cost per unit is established by the County at \$ 47.27 per Detained Day. The types of detainees will be non-juvenile males. The duration of service to be provided will be overnight holds, daily, and long term. Females will be accepted only on an emergency basis. The Contractor certifies that the unit price is not higher than the standard rate charged to any other purchaser of similar services.

Article III - Support and Medical Services

The Contractor agrees to accept and provide for the secure custody, care and safekeeping of USINS detainees

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in accordance with state and local laws, standards, policies, procedures, or court orders applicable to the operations of the facility. The Contractor agrees to provide USINS detainees with the same level of medical care and services provided local prisoners, including the transportation and security for detainees requiring removal from the facility for emergency medical services. All costs associated with hospital or health care services provided outside the facility shall be submitted through the Contracting Officer's Technical Representative, John Elton, SBPA, in the form of an original invoice(s) for direct payment by the USINS. The Contractor further agrees to notify the USINS as soon as possible of all emergency medical cases requiring removal of a detainee from the facility and to obtain prior authorization for removal for all other medical services required, with the exception that prior USINS authorization need not be obtained for the removal of USINS detainees for medical services at outpatient clinics or other local hospitals.

Article IV - Receiving and Discharging Detainees

In receiving or discharging USINS detainees from the facility, the Contractor agrees to receive and discharge such detainees only to and from persons presenting proper USINS credentials. USINS detainees shall not be released from the facility or placed into the custody of state or local officials for any reason except for medical or emergency situations. USINS detainees sought for state or local court proceedings may be acquired only with the concurrence of the USINS. The Contractor has the right to

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reject or request the immediate removal of any detainee from the facility if the subject exhibits violent or disruptive behavior.

Article V – Period of Performance

This agreement shall remain in effect indefinitely until terminated by either party upon 60 days written notice. Should conditions of an unusual nature occur making it impractical or undesirable to continue to house detainees, the Contractor may suspend or restrict the use of the facility by giving written notice to the USINS. Such notice will be provided 60 days in advance of the effective date of formal termination.

Article VI – Economic Price Adjustment

1. Payment rates shall be established on the basis of actual costs associated with the operation of the facility during a recent annual accounting period or upon an approved annual operating budget. Cost Information shall be provided on the attached Addendum, Cost Per Detainee.
2. The rate may be renegotiated not more than once per year, after the agreement has been effective for twelve months.
3. The Contractor may initiate a request for a rate increase or decrease by notifying the USINS in writing at least 60 days prior to the desired effective date of the adjustment. The Contractor agrees to provide additional cost information to support a rate increase and to permit an audit of accounting records upon request of the USINS.

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4. Criteria used to evaluate the increase or decrease in the per-capita rate shall be those specified in the Federal cost standards for contracts and grants with State and local Governments issued by the Office of Management and Budget.
5. The effective date of the rate modification will be negotiated and specified on the modification form approved and signed by a USINS Contracting Officer. The effective date will be established on the first day of the month for accounting purposes. Payments at the modified rate will be paid upon the return of the signed modification by the authorized local official to the USINS.
6. Unless other justifiable reasons can be documented by the Contractor, per diem rate increases shall not exceed the National Inflation Rate as established by the U.S. Department of Commerce.

VII – Financial Provisions

1. The billing address of the USINS office using the facility is as follows:

U.S. Immigration & Naturalization Service
Attn: Deportation Unit
Federal Building, 230 North First Avenue
Phoenix, AZ 85025

After certified true and correct by the above office, relating invoices will be forwarded to the following address for payment.

U.S. Immigration & Naturalization Service
Western Regional Office, Attn: ROBUD
P.O. Box 30110
Laguna Niguel, CA 92607-0110

INTERGOV.AGR.

2. The USINS shall reimburse the Contractor at the fixed rate identified in the agreement. The rate covers one (1) person per detained day. The Government may not be billed for two (2) days when a prisoner is admitted one evening and removed the following morning. The Contractor may bill for the day of arrival but not for the day of departure.
3. The Prompt Payment Act, Public Law 97-177 (96 Stat. 85, 31 USC 1801) is applicable to payments under this agreement and requires the payment to the Contractor of interest on overdue payments. Determinations of interest due will be made in accordance with the provisions of the Prompt Payment Act and the Office of Management and Budget Circular A-125.
4. Payment under this agreement will be due on the thirtieth (30) calendar day after receipt of a proper invoice, in the office designated to receive the invoice (paragraph 1.). The date of the check issued in payment shall be considered to be the date payment is made.
5. The original invoice shall be submitted monthly in arrears to the USINS office that has been designated to receive invoices as stated in Paragraph 1. To constitute a proper invoice the invoice must include the name, address, and phone number of the official designated payment office. In addition, it shall list each detainee, the specific dates of confinement for each, the total days to be reimbursed, the agreed upon rate per day, and the total amount billed (total days multiplied by the rate per day).

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VIII - Modification/Disputes

1. Either party may initiate a request for modification to this agreement in writing. All modifications negotiated will be written and approved by the USINS Contracting Officer and submitted to the Contractor for approval.
2. Disputes, questions, or concerns pertaining to this agreement will be resolved between the USINS and the appropriate Contractor official. Unresolved issues are to be directed to the Contracting Officer, Immigration & Naturalization Service/ROSSD, Western Regional Office, P.O. Box 30080, Laguna Niguel, CA 92607-0080.

IX - Inspection and Technical Assistance

1. The Contractor agrees to allow periodic inspections of the facility by USINS. The sole purpose of said inspections will be to insure a minimally acceptable level of services for the purpose of this agreement.

Approved by:

/s/ (Illegible)
For the Contractor

/s/ Lynn P. Kentfield
Lynn P. Kentfield
Contracting Officer
(ROSSD)
Immigration &
Naturalization
Service, Western Region
P.O. Box 30080
Laguna Niguel, CA
92607-0080

INTERGOV.AGR.

8-30-9018 Sept. 1990

Date

Date

Fund Cite:

WRO-J-031

JAIL AGREEMENTS
COST PER DETAINEE
DIRECT COST

- PERSONNEL	<u>177,702</u>
- FRINGE BENEFITS	<u>51,192</u>
- SUPPLIES, EQUIPMENT, AND SERVICES	
- FOOD	<u>14,000</u>
- MEDICAL	<u>-0-</u>
- REPAIR/MAINTENANCE	<u>3,000</u>
- CLOTHING/DRY GOODS	<u>2,800</u>
- LAUNDRY	<u>-0-</u>
- LIBRARY SERVICE	<u>-0-</u>
- MENTAL HEALTH SERVICES	<u>-0-</u>
- OPERATING COSTS	<u>36,748</u>
- OTHER Professional & outside services	<u>3,600</u>

INDIRECT COSTS

- BUILDING DEPRECIATION	<u>-0-</u>
- EQUIPMENT DEPRECIATION	<u>-0-</u>
- INSURANCE	<u>1,300</u>
- ADMINISTRATIVE FEE/SUPPORT	<u>54,725</u>

TOTAL COSTS 345,067AVERAGE DAILY POPULATION 20COST PER PRISONER/PER DAY 47.27

10
No. 91-905

Supreme Court, U.S.

FILED

JUN 29 1992

In the Supreme Court OFFICE OF THE CLERK

OF THE
United States

OCTOBER TERM, 1991

**WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, et al.,**
Petitioners,

VS.

JENNY LISSETTE FLORES, et al.,
Respondents.

**On Writ of Certiorari from the United States
Court of Appeals for the Ninth Circuit**

BRIEF OF AMICI CURIAE

**UNITED STATES CATHOLIC CONFERENCE
LUTHERAN IMMIGRATION AND REFUGEE SERVICE
ESPERANZA PARA LOS NIÑOS
VALLEY RELIGIOUS TASK FORCE
IMMIGRANT/REFUGEE CHILDREN'S PROJECT
AMERICAN FRIENDS SERVICE COMMITTEE
JOVENES, INC.
EAST BAY SANCTUARY COVENANT
ON BEHALF OF RESPONDENTS**

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AMERICAN FRIENDS SERVICE COMMITTEE
JOVENES, INC. •
EAST BAY SANCTUARY COVENANT
ON BEHALF OF RESPONDENTS

I

INTERESTS OF AMICI

Amici curiae are religious and social service organizations that provide supportive services, including temporary shelter, placement and advocacy for immigrants and refugees. Some of the *amici* directly assist children of immigrants and refugees in obtaining release from detention by the Immigration and Naturalization Service (INS) by helping them search for extended

family members and by providing alternative foster care placements. In addition, *amici* also help the children by providing other essential services, including education, job training and physical and mental health care.

Amici submit this brief in support of respondents' contention that the INS may not, consistent with the Constitution, detain children when safe, effective and less restrictive alternatives are readily available. The INS contends that custodial detention of such children, who have not been found guilty of any wrongdoing, or even determined to be deportable, safeguards the children's welfare and ensure their appearance at deportation proceedings. *Amici* submit this brief to show this Court that alternatives to such custody are readily available that safeguard the children's welfare better than INS detention. If the Court of Appeals' decision below is not affirmed, well-established organizations that protect and provide for such children will be precluded from doing so by the INS regulations at issue, even though their services are superior to INS custody.

A. UNITED STATES CATHOLIC CONFERENCE.

All active Catholic Bishops in the United States are members of the United States Catholic Conference (USCC), a nonprofit corporation organized under the laws of the District of Columbia. The USCC advocates and promotes the pastoral teachings of the Bishops in education, family life, health care, social welfare, immigration, civil rights, communications, and the economy. The USCC frequently participates in INS proceedings in support of the rights of both documented and undocumented aliens.

The Migration and Refugee Services Department of the USCC has a specific children's service unit. The unit is licensed as a child-placing agency under the laws of New York and places unaccompanied refugee minors into twenty foster care programs located in twelve states. An unaccompanied minor is defined as a child traveling without a parent, close non-parental adult relative, or a legal guardian. The USCC has resettled several thousand unaccompanied minors in foster care during the past few years.

The Unaccompanied Refugee Minors program (the Program) coordinates matters pertaining to placement, whether scheduled for family reunification or alternative care situations. The Program arranges pre-arrival and arrival formalities, including orientation of prospective caretakers and other placement procedures required by federal, state and local authorities. The Program oversees the placing and caring for minors, and organizes training and technical assistance to enhance the professionalism of the program. In addition, the Program represents the USCC before federal agencies with jurisdiction over the well-being of refugee minors.

The Program ensures that placements meet current regulations and policies in accordance with acceptable child welfare practices. The Program also sees to the expeditious placement of minors and carries out notifications to confirm that this occurs. The Program coordinates issues affecting refugee minors and contributes to the USCC's expertise on matters relating to refugee and immigrant minors.

Based on its experience with the Program, the USCC strongly believes that there are release alternatives available for detained children who have no relatives to care for them, and for this reason joins this *amici* brief.

B. LUTHERAN IMMIGRATION AND REFUGEE SERVICE.

The Lutheran Immigration and Refugee Service (LIRS) is a cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod, and the Latvian Evangelical Lutheran Church in America.

LIRS has a nationally recognized reputation for excellence in its programs for refugee resettlement, licensed foster care for unaccompanied refugee minors and immigration services. LIRS employs a three-tiered partnership approach between the national office in New York, professionally staffed regional offices (which are usually part of Lutheran social service agencies), and private volunteer groups in local communities, to maximize the ability of

its community-based network to provide material and emotional support for newcomers.

LIRS programs currently include the following:

1. Under contract with the Department of State, the refugee resettlement program (26 regional offices), and the Unaccompanied Refugee Minor programs (URM) (22 regional offices);
2. The Joint Voluntary Agency in Hong Kong;
3. Under contract with the Department of Health and Human Services, the Matching Grant program (7 sites), and the Amerasian special initiative;
4. The First Asylum concerns a program which provides funding and technical assistance to over 40 local legal and social service projects, and receives exclusive funding from foundations and church bodies;
5. Representation in Washington in connection with the Lutheran Office for Governmental Affairs;
6. Immigration services which provide training, resources and expertise to all LIRS affiliates.

LIRS has previously participated in programs for the Community Relations Service/Department of Justice during the Cuban Haitian entrant programs and is currently providing foster care to Haitian unaccompanied minors. LIRS works through a national network with licensed professional child care expertise. Through the Lutheran social service agency system and constituent congregations, LIRS can provide services virtually anywhere in the United States.

LIRS has placed over 4,000 refugee minors in coordination with its affiliated social service agencies. These minors were cared for through foster care, group homes, and independent living programs.

LIRS currently has 22 programs in 19 states, each operating in accordance with accepted child welfare practices as well as all applicable laws. In addition, each affiliate receives not only

regular state or county accreditation reviews, but also quality assurance reviews by the national LIRS office.

The flexibility and adaptability of LIRS affiliates is well tested in numerous different populations. Based on its experience, LIRS strongly believes that there are wholesome release alternatives available for detained children that would serve the Government's interests and provide conditions much more beneficial for the children's welfare than continued detention. Accordingly, LIRS joins this *amici* brief.

C. ESPERANZA PARA LOS NIÑOS.

Esperanza Para Los Niños (Esperanza) is a non-profit agency that provides assistance to unaccompanied immigrant and refugee children detained by the INS in southern Arizona and California. Esperanza is a project of Proyecto San Pablo, an ecumenical social service agency serving the Hispanic community in Yuma, Arizona. Proyecto San Pablo is governed by a board made up of representatives from eight congregations of different faiths, and the agency receives support from local churches, private foundations and national religious denominations.

During 1991 alone, 141 children were released from INS detention in El Centro, California, and Yuma, Arizona, through the assistance of Esperanza. Approximately half of these children were reunited with family members in the United States located by Esperanza. For the other half, Esperanza located alternative housing arrangements in licensed group homes or shelters.

D. VALLEY RELIGIOUS TASK FORCE.

The Valley Religious Task Force on Central America (VRTFCA) is an inter-religious organization formed in 1981 to aid Central American refugees in the Phoenix area. Part of VRTFCA's ongoing work is helping Central American children detained by the INS in Arizona. Once the children are received from detention, they are reunited with family or friends in the United States as soon as possible. Children without relatives or friends in the United States are placed with foster families and continue to receive assistance in school registration, tutoring,

locating and working with *pro bono* attorneys, limited job searches, and other services as needed.

E. IMMIGRANT/REFUGEE CHILDREN'S PROJECT.

The Immigrant/Refugee Children's Project (the Project) began in 1985 in response to the incarceration of unaccompanied immigrant and refugee children by the INS. The Project supports a humane policy of expeditiously releasing children who are detained. To further this goal, the Project operates a shelter in Los Angeles that is licensed by the Department of Social Services. It also coordinates its services, including recruitment of foster families, with local religious organizations, such as Catholic Charities of Los Angeles and the Mission Brothers of Charity.

The Project strongly opposes current INS regulations limiting the release of unaccompanied children to parents, legal guardians and close relatives. Under these regulations the children now served by the Project would be detained by the INS rather than being released to its licensed group home.

F. AMERICAN FRIENDS SERVICE COMMITTEE.

The American Friends Service Committee (AFSC) is a Quaker organization that conducts programs of service, development, justice, and peace through its headquarters in Philadelphia, nine regional offices across the United States, and program operations in 30 countries overseas. AFSC has worked with and promoted the rights of immigrants and refugees regardless of race, nationality, creed or political affiliation for 75 years. AFSC monitors the actions of the Immigration and Naturalization Service at the Mexican border and documents official abuses against citizens and non-citizens, including children. AFSC programs throughout the United States also advocate respect for the legal and human rights of all people in this society. It objects to any loss of liberty when no crime has been committed and sees such detention as a violation of those rights.

G. JOVENES, INC.

Jovenes, Inc. (Jovenes) is a non profit organization in the Los Angeles area dedicated to helping homeless teenagers and young

adults, particularly, unaccompanied immigrant children. Jovenes provides education, job training and temporary shelter for these children. In addition, Jovenes evaluates the need of each youngster who comes to its Service Center and determines the best way to provide immediate and long term assistance to each one. By working with other public and private human services agencies, Jovenes is able to provide health care to the children, place them in school, enroll them in foster care homes, and even assist in relocating them — sometimes to their native countries — whenever it is appropriate.

Jovenes believes that undocumented, immigrant children should be provided the basic care and opportunities that are available to other children in our communities. Jovenes also believes that there are viable alternatives to the current INS regulations, which call for the detention of these children, and that these alternatives are better not only for the children, but for the welfare of society as a whole. These alternatives are currently in place, accessible, and, in most cases, can be obtained by a telephone call.

H. EAST BAY SANCTUARY COVENANT.

The East Bay Sanctuary Covenant (EBSC) was founded in 1982 to support refugees from El Salvador and Guatemala. EBSC provides services throughout California and much of south Texas. One of EBSC's activities is the Refugee Rights Program, which helps refugees who are fleeing from war-torn countries and who are held by the INS pending deportation proceedings. The Refugee Rights Program assists those refugees in proceedings before the INS with the goal of protecting them from deportation and possible death or persecution upon return to the country from which they fled. Refugees can use a toll-free telephone number to contact the EBSC while in detention anywhere in the country to request aid in their deportation proceedings. EBSC also provides legal representation and helps place unaccompanied children with new families.

II

SUMMARY OF ARGUMENT

Amici submit this brief in support of respondents' contention that the INS may not, consistent with the Constitution, detain children when safe, effective and less restrictive alternatives, such as those provided by *amici*, are readily available. These alternatives provide a range of non-institutional living arrangements that protect the physical and emotional well-being of children. INS detention, however, does not. *Amici* believe that INS detention has an enormous detrimental impact on the welfare of the children and society as a whole. The INS can easily use the various well-established programs offered by their organizations, and others like them, without assuming additional burdens or expenses, and with little, if any, risk that these children will not appear at their deportation hearings.

III

ARGUMENT

A. DETENTION OF CHILDREN BY THE INS IS UNNECESSARY AND DOES NOT PROTECT THEIR WELFARE.

The detention of any person in government custody, prior to a hearing, is a substantial infringement on the fundamental right to liberty protected by the Constitution. This deprivation of liberty is impermissible, absent a showing by the INS that detention is necessary to achieve a legitimate government purpose. This would be true, as a matter of constitutional law, regardless of whether the detainees were children or adults.

However, because the detainees in this case are children, their interests should be considered with special solicitude for their unique vulnerability and special needs. See *Eddings v. Oklahoma*, 455 U.S. 105, 115-16 (1982); *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring). Here, the INS regulations at issue call for the institutional confinement of children — children who have never committed a crime, who are not a risk to society, and who are themselves often victims of cruelty and

oppression in their native lands. These regulations are inhumane and largely detrimental to society as a whole.

The devastating effect of detention on the psychological and physical health of these children is not disputed. Confinement in an institutional setting such as an INS detention facility can impair children's physical and emotional development; diminish their sense of self-worth; place them at risk of physical harm by other detainees; and deprive them of contact with family and other sources of psychological and social support. Applicable standards for the treatment of juveniles in governmental custody recognize that children should always be placed in the least restrictive setting available, and permit detention only when no open type of placement is available that will ensure the minor's safety. See, e.g., U.S. Department of Justice, National Institute for Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration Standards on Adjudication 3.153; Department of Health and Human Services, Office of Refugee Resettlement, 52 Fed. Reg. 38,147 (1987); Institute of Judicial Administration, American Bar Association Juvenile Justice Standards 3.1, 5.7, 6.7 (1980).

Furthermore, the psychological damage to these children caused by their detention will bring about long-term detrimental effects to our society, since some of them will remain legally in this country after completing the deportation hearing process. See *Plyler v. Doe*, 457 U.S. 202, 207 & n. 4, *rehearing denied*, 458 U.S. 1131 (1982). These children can not lead productive lives in our society if they do not receive appropriate care, which encompasses adequate shelter and education. The large detention facilities in which these children are currently placed do not adequately provide for them. As shown herein, numerous well-established existing alternatives, however, do.

B. EXISTING AND ESTABLISHED PROGRAMS OFFER ACCESSIBLE, SAFE AND EFFECTIVE ALTERNATIVES TO DETENTION OF CHILDREN.

The INS justifies its restrictive release policy by stating that "concern for the welfare of the juvenile will not permit release to just any adult . . .", 53 Fed. Reg. 17,499 (1988). The INS's

release policy, however, is detrimental to the children, and is not rationally related to the stated interest of concern for the child's welfare.

The INS admits that it is not a child welfare agency, and that it lacks the expertise or resources to perform investigations of potential placements with non-relative caretakers. Although conceding its lack of expertise in child welfare, the INS still maintains that it can provide appropriate care for children within detention facilities, and refuses to release detained children to qualified persons and agencies who *do* have expertise in child welfare. The INS concludes, without factual support, that children cannot be safely released to anyone but parents or certain close relatives, and so the only alternative to the release of children to "just any adult" is to keep them safely imprisoned in detention facilities.

Unfortunately for the children, the INS's restrictive release policy ignores the numerous well-established, reputable programs operated by religious and social service agencies that provide a full range of quality foster care and services for these children, which are clearly preferable to the stark realities of INS detention. Therefore, detention is unnecessary, even for those children who have no available relatives.

Community-based foster care programs, some administered by *amici* organizations, answer the legitimate concerns the INS may have about releasing children from detention to unrelated adults. Their sponsorship by reputable religious or social service organizations, and their long-standing records of providing care for immigrant and refugee children, provide adequate assurances that the children will be safe and well-cared for and are not being released "to just any adult." These programs are designed to address all the children's needs, not only for food, clothing, and shelter but also for education, counseling, health care, recreation, assistance with locating relatives, and other support. Most importantly, these programs can provide care for children who have no family members available to care for them in a non-institutional setting, which is crucial to their well-being and continued growth.

1. Resettlement Programs.

Well-established programs for the resettlement of unaccompanied refugee minors (URMs) are administered by private agencies in conjunction with the federal government. See 45 C.F.R. Sections § 400.110, *et seq.* These existing programs can be readily adapted to serve children detained pending deportation hearings. For example, the programs administered by the LIRS and the USCC serve these children, and include a national network of foster family homes, group homes, and independent living arrangements for older minors, coordinated through affiliated local social service agencies. The LIRS, for example, has affiliates in 19 states. These URM programs have been in place for many years and have served thousands of refugee children under contract with the Department of State, Bureau for Refugee Programs, with funding by the Department of Health and Human Services, Office of Refugee Resettlement.

These programs regularly receive state and county accreditation reviews, as well as quality assurance reviews by the national offices of the sponsoring organizations. The programs have special expertise in providing culturally appropriate placements and programs, and in assisting children with family location and reunification. The size and national scope of these programs, and the agencies' expertise in working with children of many diverse cultural backgrounds who come from regions in conflict, ensure their ability to accommodate the needs of children awaiting deportation hearings.

A current example is the handling of Haitian unaccompanied minors who are being paroled into the United States pending pursuit of their asylum claims. Both LIRS and USCC are successfully placing these children into their URM programs under an agreement with the Community Relations Service of the Department of Justice. In addition to receiving professional children's services, Haitian minors receive *pro bono* legal assistance from local attorneys who help them through the asylum process and also counsel them about the availability of other immigration remedies.

The URM programs are accredited and licensed by the states in which they operate, and each child placed through an URM program receives the full range of services he or she needs. These programs provide quality childcare welfare services, monitoring and accountability that conform to standard child welfare guidelines. All placements are investigated and approved by child welfare authorities. Thus, the INS's fears that it would be obliged to perform home studies itself, or else the children would be released to irresponsible persons who might harm them, lack factual support.

2. Programs For Pre-Hearing Needs.

In addition to the existing network of URM programs, other programs address the needs of children who are detained while awaiting deportation hearings, such as programs run by *amici* Immigrant/Refugee Children's Project, Esperanza Para Los Niños, Valley Religious Task Force and Jovenes, Inc.

Since 1985, the Immigrant/Refugee Children's Project has worked with local religious and social service agencies to obtain the prompt release of detained children. In March 1990, the Project opened a children's shelter for immigrant and refugee children in the Los Angeles area. The shelter is a licensed group home providing transitional living to youth between the ages of 5 and 17. Project staff help these children reunite with family members in the United States, or in the child's home country if the minor wishes and is able to return. When children have no family or friends to take them in, the Project works to secure permanent placement with host families. The Project also provides other essential services, including *pro bono* legal assistance, in-house mental health services (individual sessions and group therapy), medical examinations, school placement, vocational counseling, and cultural and recreational opportunities. In addition, the children receive academic tutoring services and assistance in learning English.

The Children's Project also provides after-care services to all children who leave the shelter facility. These services include referrals to community services, family counseling, and assistance in dealing with various adjustment or acculturation difficulties

they may encounter. The project coordinates these services with local religious organizations, including Catholic Charities of Los Angeles and the Mission Brothers of Charity. If the restrictive INS release policies are allowed to be implemented, the children will not receive the benefits of these services.

Esperanza Para Los Niños is a non-profit social service agency supported by various religious organizations that assists detained children in locating extended family members and obtaining release into their care. The agency also assists children who have no available family in the United States by locating alternative housing and social services, such as shelters and licensed group homes. In 1991 alone, 141 children were released from detention through the assistance of Esperanza Para Los Niños in El Centro, California and Yuma, Arizona.

The Valley Religious Task Force has a long-standing program of helping detained children in Arizona locate relatives or finding foster placements for them, and helping them gain to school, health care, and other basic services. Jovenes provides similar services in the Los Angeles area.

These programs are specially developed by *amici* with the best interest of immigrant and refugee children in mind. *Amici's* programs permit the children to lead a fairly normal life while they await their immigration hearings. The children live in non-institutional settings, attend regular schools, assist church services, and are generally able to do the things that children their age are supposed to do. If the Court of Appeals decision is reversed, *amici* will no longer be able to provide their services to these children, because the INS will keep them detained.

3. Minimal Impact on INS Resources.

The INS will not incur any additional expenses by working with these organizations to place the children.¹ The programs

¹In fact, the INS will save money by allowing *amici* to place the children. URM programs, for example, have a very low per capita cost compared to other institutionalized settings. Estimated costs range from \$29 to \$35 per day, per child, not including medical reimbursement

offered by *amici* organizations are well established and easily accessible. *Amici* organizations work closely with legal groups who call them when children need their services. Most can be reached by telephone 24 hours a day by the children, the lawyers assisting them, or even by INS officials themselves.²

These organizations are willing and able to place these children in foster homes or other non-institutionalized settings. For example, Esperanza Para Los Niños has arranged to receive a list of all newly detained children everyday with detention centers that are located close to it. It then immediately sends people to the detention center to do legal intake to determine the needs of these children. INS resources are hardly utilized. There are many groups like *amici*; if the INS were to fully utilize them, the children could be spared the hardships of detention at a minimum cost to the INS.

4. Minimal Risk of Flight.

The INS also justifies its practice of detention by stating that it is necessary to ensure that the children appear at their deportation hearings. The INS, however, provides no facts supporting its alleged fear that the children will flee if released to organizations such as the ones discussed above. The INS's concern is not justified.

First, as mentioned above, these are reputable organizations with long-standing records of providing care for immigrant and refugee children. These organizations aim not to frustrate the INS's goal of implementing the immigration laws, but to assist

costs. This amount includes national and local office administrative costs, local affiliates' costs, case management expenses, foster family payments, clothing allowances, and other related costs. INS detention, however, costs up to \$100 per day, per child.

²For example, lawyers reach LIRS by calling its central office, which coordinates the placement of the child within its network of Unaccompanied Refugee Minor programs. The INS currently utilizes LIRS by working with the Department of Justice's Community Relations Services to place unaccompanied Haitian children. The USCC is similarly accessible.

the children through the established process. They will not jeopardize their ability to do so by breaking the laws.

Further, these organizations usually (if not always) provide *pro bono* legal representation. Lawyers promptly review the case of each child released to these organizations to establish what right the child has to remain in this country. The lawyers then represent the child *through* the process; they do not avoid the process by helping the child to flee. In fact, these organizations make every effort to ensure that the children will appear at their deportation hearings.

Finally, to reduce its fear that the children will not appear at the hearing, the INS can easily require that it remain informed of the location of each child at all times. Most *amici* organizations keep track of the children they place. To the extent that some, if any, do not, the INS could easily require that they do so as a condition of release of the children to them. Thus, if the children do not appear at a hearing, the INS could find them with very little effort.

Amici believe that the INS's fear that the children will not show up at their deportation hearing is unfounded. Children are not likely to run away if placed in a nurturing environment. However, any risk that they will not appear could be minimized if the INS is kept informed at all times of the location of each released child. *Amici* organizations can do so at minimal expense, given that tracking systems are most likely already in place. *Amici* believe that the price paid by the children, and society in general, if the children are *not* released, is immeasurable.

IV

CONCLUSION

It is undisputed that foster care for children in a non-institutionalized setting is considered far better, by all applicable child welfare standards, than incarceration in a detention facility. The INS cannot justify detaining children, where safe and effective alternatives are offered by *amici* religious and social service organizations and can easily be utilized by the INS. The cost of detention both to the children and to society is incalculable. Thus, *amici curiae* respectfully urge the Court to affirm the decision of the Court of Appeals.

ORRICK, HERRINGTON & SUTCLIFFE
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OCTOBER TERM, 1991

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JENNY LISETTE FLORES, *et al.*,
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BRIEF OF *AMICI CURIAE*
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QUESTION PRESENTED

Whether the Immigration and Naturalization Service may incarcerate and detain a child pending a deportation hearing, without a prompt, individualized determination that detention is in the child's best interests, including the determination that it is not in the child's interest to release the child to a responsible adult other than a close relative or legal guardian?

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**BRIEF OF AMICI CURIAE
 CHILD WELFARE LEAGUE OF AMERICA AND
 DEFENSE FOR CHILDREN INTERNATIONAL—USA
 IN SUPPORT OF RESPONDENTS**
 —

INTEREST OF AMICI CURIAE

The Child Welfare League of America ("CWLA") is a 70-year-old organization comprising over 630 child welfare agencies from across the United States. Together with the 150,000 staff members from its member agencies, CWLA works to ensure quality services for over two million abused, neglected, homeless, and otherwise troubled children, youth, and families. Although not opposed to all institutional placements of children, CWLA believes that the detention of children under the circumstances of this case is inconsistent with the interests of the children and sound child welfare policy.

Defense for Children International-USA ("DCI-USA"), the U.S. section of Defense for Children International ("DCI"), is a not-for-profit corporation engaged in the promotion of children's fundamental human rights, as recognized in the Convention on the Rights of the Child and the World Declaration on the Survival, Protection and Development of Children. DCI has national member sections in approximately 35 countries and has consultative status with the United Nations Economic and Social Council and with the United Nations International Children's Emergency Fund. National sections of DCI are charged with attending to the particular situation of immigration and refugee children in their own countries. As part of its activity in this area, DCI-USA has participated in the Working Group that has met regularly with representatives of the Department of Justice and the Immigration and Naturalization Service ("INS") regarding the problem of detention of undocumented, unaccompanied children entering the United States.

CWLA and DCI-USA both have a compelling interest in ensuring that children, such as those represented here, are not institutionalized in the absence of an individualized determination that detention is in their interest—and that release to a willing and responsible adult is not.*

STATEMENT

Amici adopt Respondents' Statement of the Case and seek to emphasize only a few points which will help to clarify the legal issues before the Court and the factual record upon which the Court's determination must be based.

1. This case involves incarceration and confinement of children. Although the government tries to characterize the detention it imposes on these children as somehow beneficial, there is no mistaking the fundamental difference between incarceration and physical freedom. Incarceration involves the loss of the most basic freedoms. For

* The parties' letters of consent have been filed with the Clerk.

the child it may have a devastating psychological effect. And beyond the physical loss of freedom, and the attendant psychological and emotional effects of confinement, even the most idealistic institutionalization plan poses additional problems. Where the government attempts to administer the institution, subject to budgetary and bureaucratic limitations (and where the inmates are members of a disfavored class), the potential for good intentions to evolve into inadequate facilities, indifference to inmate needs, neglect, and even abuse, is great. The record developed in this case demonstrates the point.¹

2. The government does *not* here try to advance the general proposition that children who are not in the custody of a parent or legal guardian ought to be, absent compelling circumstances, rounded up and granted the "benefits" of institutionalization of the kind which the INS provides these alien children. No serious contention has or could be made that as a general rule children *not*

¹ As shown in Respondents' Brief, the record demonstrates that these children have been kept by the INS in facilities with unrelated adults where they must share sleeping quarters, bathrooms and other common areas with adult prisoners, without the provision of adequate educational and recreational facilities and equipment, often in facilities secured by barbed wire, security fences and automatic locks, where the major form of activity is TV watching and standing in line to make collect telephone calls.

For the portrait of detention it seeks to paint, the government relies largely on the terms of a settlement agreement it entered into at an early stage of this very litigation. Pet. Br. at 11-12. But if the history of institutional litigation in this country teaches anything, it teaches that the reality of institutionalization rarely lives up to the promise of any regulatory scheme. That is one reason why freedom, rather than institutionalization, should be the rule.

Public record materials presented to the court of appeals below documented well that current conditions remain harmful to children. Children are still being held in handcuffs and shackles, receiving inadequate food, and subject to arbitrary punishment. See California Legislature, Joint Committee on Refugee Resettlement, International Migration and Cooperative Development, *Joint Interim Hearing on Impact of INS Policies and Reforms* (July 19, 1990).

in the custody of a close relative or guardian, but in the care of some other responsible adult, are better off being institutionalized in the manner at issue here.

3. These children have been arrested, in essence, on suspicion of being deportable, but not yet adjudged deportable. And as the Respondents make clear, the record is undisputed that many of them will remain in confinement *for up to a year* before any final determination is made. Many of them will never be deported at all; some of them will be found to be citizens. In the interim, as the court below found and as the INS Regional Director admitted, the class of children before the Court pose no risk of flight before their deportation hearings, no threat to the community or themselves, and have not been charged with any criminal conduct or wrongdoing. *Flores v. Meese*, 942 F.2d 1352, 1354 (9th Cir. 1991) (*en banc*). Put most simply, in the eyes of the law these children are innocent and could not be held under any rationale *previously* recognized by this or any other court for maintaining an individual in custody pending trial.

4. So far as the recent cases of this Court reflect, no extended or serious deprivation of physical liberty has ever been permitted absent an *individualized* determination² that such a deprivation is necessary to further a particularized and important interest of the government. This case involves the refusal of the government to make such an individualized determination.

5. Instead of weighing the best interests of the particular child in an individualized way, the government

² Indeed, the only cases in which this Court has tolerated a class-based deprivation of liberty, without an individualized and particularized showing that the loss of liberty was necessary to further an important state interest, were in time of war. In the Japanese internment cases, a class-based detention was upheld as a permissible exercise of the government's war power. *Korematsu v. United States*, 323 U.S. 214 (1944). See also *Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909).

has declared *ipse dixit* that where there is no parent, close relative, or legal guardian available, the child may not be freed. The government asserts that its *parens patriae* authority allows it to declare that institutionalization is in the child's best interest. No serious contention is made, however, that this is true, as a matter of fact, with respect to most, let alone all of the children. The record established in the court below shows beyond peradventure that it is *not* true with respect to many of the children who are detained, who by the government's own admission come from diverse countries and backgrounds and may suffer from a variety of physical deprivations and psychological and emotional disabilities.³ Thus, despite the assertion by the government that this deprivation of liberty is in the children's best interest, in a substantial number of cases, indeed most cases, the children who are confined by the government would be far better off if released to responsible adults.

6. The government's ultimate justification, therefore, takes the form of an assertion of administrative convenience. It couples this interest with the anomalous assertion that its *parens patriae* authority allows it to elevate its own administrative convenience over the individual child's best interest. The number of children involved, which the government claims justifies this administrative convenience rationale, only serves to emphasize how much harm is done by the current rule.⁴ Moreover, while it is

³ A study cited by Petitioners (Pet. Br. at 8 n.12; 12 n.16) and lodged with the Court found that many of these children are physically or emotionally scarred by civil strife in their home countries, and have seen family members and friends killed, threatened or sexually assaulted, and homes and schools damaged or destroyed. Nestor P. Rodriguez & Ximena Urrutia-Rojas, *Undocumented and Unaccompanied: A Mental-Health Study of Unaccompanied, Immigrant Children from Central America* 1-4, 27-34 (1990) (Monograph, University of Houston) ("Undocumented Children Study").

⁴ The government states in its brief that the INS took custody of 8542 children pending hearings on their deportability in 1990. While the government did not then keep records as to the number

undoubtedly in some sense *easier* to detain these children indefinitely, rather than look to their particular circumstances, it is certainly no more costly to give them a hearing than it is to institutionalize them for months on end. Perhaps more to the point, this Court has *never* authorized a substantial loss of physical liberty on the basis of a claim that affording a modicum of due process protection would be troublesome or inconvenient to the government.

7. Although the government is at pains to paint the decision below as aberrational, the court below did nothing more than recognize that if the government seeks to justify a detention as in the child's best interest, then that detention may not be imposed without specific consideration of that interest—including attention to the propriety of release to a qualified adult willing to assume responsibility for the child. The court explained that although the INS may "determine on the basis of the particular case whether release of the child poses a danger to the community or could result in harm to the child, the blanket refusal to make individualized determinations in the guise of administrative expediency cannot pass constitutional muster." *Flores*, 942 F.2d at 1363. Thus, the only new requirement placed on the INS was that it determine whether release of the child to a responsible adult who offers to take custody would represent a danger to the child's well-being. *Id.* at 1364.

of children who were unaccompanied by relatives, records from the Southern Region indicate that 73% of the 1259 children detained in South Texas in 1989 were unaccompanied. Pet. Br. at 8-9. Before 1984, the INS, like every other federal agency, was willing to release children to responsible adults, even if not closely related. INS changed its policy, not based on any enlightenment it received about the best interest of the children but as a direct result of what it perceived as a surge in alien children entering the country without their parents. Pet. Br. at 8-9.

SUMMARY OF ARGUMENT

Freedom from physical confinement is the core of constitutionally protected liberty. The most basic notions of due process rest on the premise that if the government is to imprison a person, the government must show that there is some compelling reason for the imprisonment. The government may incarcerate an individual only where it has made a determination that the incarceration of that individual serves a compelling government interest. If a class of persons is to be detained, then the government must show that it has an interest in incarcerating each and every member of that class. Generalities will not suffice.

Each of these children has a presumptive right to be free unless the government presents some sound reason why he or she should not be free. The burden is always on the government to justify incarceration. The issue in this case is whether the government has established procedures which ensure that it has met *its* burden in *each case* of showing that some reason actually exists for denying these children their basic freedom.

It is well-established that aliens may be detained pending deportation proceedings if it is determined that they pose a risk of harm to national security, a danger to the community, or a risk of flight. None of these interests is asserted as justification for the detention in this case. Instead, the government asserts a *parens patriae* interest in protecting the welfare of these children. But under the circumstances here, due process requires that the government demonstrate, on an individualized basis, how that interest is served by the institutionalization of the child.

INS has attempted to replace the required individualized determination about the interests of the child with a blanket—and factually insupportable—generalization about the persons to whom release would be appropriate and in the child's best interest. Even assuming that it

is permissible in some cases to incarcerate by generalization, that generalization must, as a factual matter, reflect and closely parallel whatever the government asserts in the first instance as its rationale for incarcerating that individual.

In fact, the rule that the government has adopted here incarcerates children when it is not in their best interest not just in *some* cases, but in the vast majority of cases. There is quite literally no evidence to support INS's intuition that release of a minor to a responsible adult will result in harm to the child. To the contrary, there is true consensus that children should be detained only upon a reasoned determination that confinement is necessary. Release to the custody of responsible adults is virtually always preferable to institutionalization. Unnecessary detention, imposed with no determination of the individual child's needs, can cause substantial physical, psychological, and emotional harm.

Given the government's asserted rationale for maintaining these children in custody, the court below did no more than hold that these children were entitled to an individualized determination that maintaining them in custody was, in fact, in their best interest—and releasing them to competent adults, willing to assume responsibility for them, was not. The procedures prescribed by the court below required nothing more than that the children not be deprived of their fundamental liberty without consideration of that issue.

ARGUMENT

I. CHILDREN HAVE A FUNDAMENTAL SUBSTANTIVE RIGHT TO FREEDOM FROM GOVERNMENTAL INCARCERATION AND DETENTION.

A. This Case Involves A Deprivation Of Physical Freedom, A Liberty Protected By The Due Process Clause.

This Court has long held that due process under law contains a "substantive component . . . that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Although there is room for debate at the margins, there is no doubt that freedom from physical restraint is one of the core interests protected by the terms of the Due Process Clauses of the Fifth and Fourteenth Amendments. The government here professes some confusion about the nature of the substantive right at stake. Yet that right is the most basic and fundamental of all: the individual's strong interest in physical liberty, which was central to the Framers' design. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). *Accord Board of Pardons v. Allen*, 482 U.S. 369, 373 n.3 (1987) ("liberty from bodily restraint is at the heart of the liberty protected by the Due Process Clause").⁵

⁵ Although the government notes that this Court has cautioned against an expansive view of the rights protected under the heading of substantive due process, the government does not dispute that such rights exist and that freedom from physical restraint is close to its core. Nor could the government argue that "due process is merely procedural." If a law were passed giving some government

The initial court of appeals panel that considered this case made a fundamental mistake when it attempted to redefine the claim of the children here as one seeking recognition of a "fundamental right" "to be released to an unrelated adult," *Flores v. Meese*, 934 F.2d 991, 1006 (9th Cir. 1990), and thus concluded that any rule with a rational relationship to a legitimate government interest would suffice to justify incarceration. The Due Process Clause focuses on whether there has been a deprivation of "life, liberty or property without due process of law."⁶ Here, basic liberty is at stake—a right to freedom that is itself "fundamental." It is not the individual's burden to show that he or she should be released. Rather, it is always the government's burden to show that there is a good and sufficient reason for the individual to be confined.

B. The Government Has A Legitimate Interest As *Parens Patriae* In Seeking To Act In The Child's Best Interest.

The constitutional protection against physical constraint is, of course, not absolute. Indeed, it is perhaps better phrased as a right to be free from confinement absent the demonstration by the government of good and sufficient reasons for the confinement. Thus, in support of

official the power to imprison those who were undesirable—albeit only after a full adversarial hearing—there would be no question but that such a law could not be sustained, notwithstanding the procedural protections. Substantive due process means that the government cannot deprive an individual of physical liberty without good reason actually found in the case before it.

⁶ As this Court recently explained:

In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause.

DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189, 200 (1989).

certain well-recognized interests, the government may indeed physically constrain the liberty of an individual. To choose the most obvious example, a finding that an individual is guilty of violating the criminal laws has always been recognized as providing a basis for incarceration. In addition, the Court has recognized that pre-trial detention can be justified in certain circumstances, such as when necessary to ensure the presence of the defendant at trial, upon a specific finding relating to that determination—the bail hearing. Similarly, this Court has allowed the detention of individuals "who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel." *United States v. Salerno*, 481 U.S. 739, 755 (1987). See also *Schall v. Martin*, 467 U.S. 253 (1984) (post-arrest detention of juveniles who present a danger to the community).

Despite these recognized exceptions, the fact remains that in "our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. If a deprivation of physical liberty is not justified by a "compelling governmental interest," *id.* at 748, 750, then it is forbidden "regardless of the fairness of the procedures used to implement [it]." *Foucha*, 112 S. Ct. at 1781 (quoting *Zimmerman v. Burch*, 494 U.S. 113, 125 (1990)). Only where the government demonstrates a compelling interest in continued detention does the interest of the individual in continued liberty give way.

This case involves none of the concerns that have heretofore been thought to justify continued detention pending trial. The class of children granted relief here are not dangerous and would be found, if released, to appear at any required hearing. See *Flores*, 942 F.2d at 1357. Thus, the government seeks to justify the detention of these children citing a rationale that has never been used, without more, to justify pre-trial detention. The

government asserts that the detention is in the best interest of the children themselves and that it has so determined under its authority *parens patriae*.

Neither *amici*, nor the court below, have questioned the legitimacy of the government's interest in the welfare of these children or the notion that on a given set of facts, that interest might be viewed as compelling. And indeed, in a variety of contexts it has been recognized that the State may justify the detention of an individual for that individual's own good. But the government's invocation of the child's interest as its own only begins the inquiry, for it merely identifies the basis on which the government seeks to justify confinement. It remains the burden of the government in every case to show on the facts of every case how the interest it asserts is actually served by depriving an individual of his or her basic freedom from confinement.

C. Due Process Requires That Any Deprivation Of Physical Liberty Be Supported By An Individualized Determination.

If the rationale for continued confinement is that it serves the child's best interest—as the government asserts here—then it is the government's responsibility to make that determination with respect to each child whom it would confine and afford each child the opportunity to refute it. That is because confinement which has *not* been justified is a deprivation of due process. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (State has *parens patriae* interest in caring for the mentally ill but “no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others”) (emphasis added).

This principle—that the government can justify physical confinement only by demonstrating that the compelling interests which the government asserts would, in fact, be furthered by the confinement—is implicit in each

of the cases described above addressing pre-trial detention. Where the justification for detention asserted by the government is “dangerousness,” then the dangerousness of the individual must be shown; where it is “flight,” then the likelihood of flight on the part of the individual must be shown, as in a bail hearing; where it is dangerousness to himself, as in the case of a mental patient, then that dangerousness must be shown in the individual case. Thus, for example, a person cannot be involuntarily committed to a psychiatric institution absent a specific showing, on an enhanced burden of proof, that he is dangerous to himself or others. *Addington*, 441 U.S. at 425-27. And in immigration cases, the government must make “some level of individualized determination” before it imposes conditions on release bonds pending the alien's deportation hearing, *INS v. National Ctr. for Immigrants' Rights*, 112 S. Ct. 551, 558-59 (1991), and can detain an alien only upon a showing that he is a “threat to national security or is a poor bail risk.” *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976), cited in *O'Rourke v. Warden, Metropolitan Correction Ctr.*, 539 F. Supp. 1131, 1135 (S.D.N.Y. 1982). A deprivation of an individual's liberty must rest on a sound factual basis, specific to the person whose liberty is to be taken, and not on mere generalizations about a class of persons. The decision of the court below does nothing more than assure that such an individualized determination is made in every case.

The facts that must be found in each case are the facts that would support the government's interest in continuing detention. If the government, in asserting that it was acting in the best interests of the children involved, was willing in fact to make the determination that confinement was in the *individual* child's best interests, the result below would have been different. But while asserting its *parens patriae* interest generally, and invoking the welfare of children generally, the INS declined to make such an inquiry, substituting in its stead a rule of

administrative convenience that has as its consequence the continued incarceration of many children when such incarceration is patently *not* in the child's best interest.⁷

D. The Prohibition On Release To Responsible Adults Other Than Close Relatives Or Legal Guardians Unduly Circumscribes The Individualized Inquiry Which The Due Process Clause Requires.

The INS's detention policy lacks "fundamental fairness" in a fundamental way: it predicates detention not on an inquiry about the individual child's best interests, but on a *generality* about his or her supposed interest. The rule the INS has adopted predicates release on the availability of an adult custodian who either (1) falls within INS's narrowly drawn class of *per se* acceptable relatives or (2) successfully negotiates the local requirements for legal guardianship (8 C.F.R. § 242.24(b)(1)). That rule could be, at most, a surrogate for—an approximation of—the particular child's best interest. In fact, it is not even that.

The government is apparently of the view that in some cases the child's best interest will not be served by release to a nonrelative who is willing to take responsibility for the child. But in truth, in a large number of cases, such release is, in fact, in the child's best interest. The effect of the government's rule is that in every such

⁷ Indeed, the government's brief undercuts its blanket policy by admitting that the interests vary from child to child. As a study that INS cites makes clear, the children differ widely in age, nationality, and psychological condition, all of which can bear on determining whether a given child's welfare is better served by release or detention. Pet. Br. at 8 n.12; 12 n.16 (discussing *Undocumented Children Study*). It may be, as INS suggests (Pet. Br. at 11), that the interests of some of these children will best be served by detention, if it conforms to the standards established by the Alien Minors Shelter Care Program of the Community Relations Service, U.S. Department of Justice, 52 Fed. Reg. 15,569 (1987), reprinted in Pet. App. at 152a-167a. But even on the government's terms, it does not follow that all will benefit from it.

case, a child is kept incarcerated wrongfully, where there exists no legitimate government interest in restricting the child's freedom.

The need for individualized determinations applies with particular force to children, because they enjoy a "unique" status under the law. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979). As this Court has recognized, childhood "is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Therefore, the government's duty must be determined with "sensitivity and flexibility," out of concern for children's "peculiar vulnerability" during their formative years. *Bellotti*, 443 U.S. at 634.⁸ Given the possibility that Respondents, who are merely suspected of being deportable, will remain here permanently, the government has a long-term stake in protecting them against the physical, emotional, and psychological consequences of unnecessary detention.⁹

In asserting its *parens patriae* authority in support of its current rule, INS effectively seeks to exploit the children's special status under the law. The rule and prac-

⁸ Whereas adults might be capable of rationalizing their own detention, children typically "respond to any threat to their emotional security with fantastic anxieties, denial, or distortion of reality, reversal or displacement of feelings—reactions which are no help for coping, but rather put them at the mercy of events." Joseph Goldstein *et al.*, *Beyond the Best Interests of the Child* 12 (1973). They "come to see society at large as hostile and oppressive and to regard themselves as irremediably 'delinquent.'" *Schall*, 467 U.S. at 291 (Marshall, J., dissenting) (citing Aubry, *The Nature, Scope and Significance of Pre-Trial Detention of Juveniles in California*, 1 Black L. J. 160, 164 (1971)).

⁹ Cf. *Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("a State cannot realistically determine that any particular undocumented alien child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.").

tice the INS has adopted forecloses inquiry into the very heart of the matter to be determined, the specific factual basis for depriving *this* individual of his liberty.

Generalities—even well-founded generalities, which the one at issue here is not—ought to have little role in connection with government decisions about imprisonment or detention. If a person is to be detained for a lengthy period because he or she is a member of a class, then the government must have an interest in detaining each and every member of that class.¹⁰ But even if there is some room for administrative rules and factual presumptions in connection with the imposition of physical confinement, the role of such presumptions must be limited. They make sense only where they approximate very closely the government interest that would justify confinement.¹¹

¹⁰ The government's suggestion (Pet. Br. at 25 n.26) that the catalogue of cases in *Salerno*, 481 U.S. at 748-49, justifies detention here is without merit. Only one of the catalogued cases permitted detention absent some form of individualized determination, and that was over 80 years ago in the extreme circumstance of a governor's declaration of insurrection arising out of labor unrest, when the Court found that "[p]ublic danger warrant[ed] the substitution of executive process for judicial process." *Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909).

It might be argued that somewhat greater scope for generalizations as a predicate for confinement are allowed in time of war, or in matters affecting national security. Nonetheless, individualized factual determinations have been the rule. See, e.g., *Ludecke v. Watkins*, 335 U.S. 160 (1948) (determination that the individual is an "enemy alien"); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952) (denial of bail pending deportation hearing where evidence demonstrated aliens were members of Communist party, based on legislative determination that members posed a threat to nation's security). But see *Korematsu*, 323 U.S. at 218-19.

¹¹ For example, as noted above, the State might justify the confinement of a mentally ill person on the basis of a finding that such a person is a danger to himself. In aid of that particularized determination a state might adopt a rule that said, for example, that a person who is specifically found to have attempted suicide may be confined for 30 days for their own protection, absent a compelling

The reason why such a close fit is required is that any misfit will likely result in the incarceration of persons who, under the government's own rationale, ought not be incarcerated. To choose an example close to this case, the government might arguably adopt a rule that an alien child should presumptively not be released to a convicted felon, absent good cause. In such a circumstance, preventing the child's exposure to criminal influences would be viewed either (1) in and of itself to be a compelling government interest; or (2) to very closely parallel the interest the government has in protecting the child.

The difficulty with the rule that the government has adopted here is (1) that the government has no interest, compelling or otherwise, in keeping a child from being temporarily supervised by an unrelated, but nonetheless responsible adult; and (2) as shown below, the rule does *not* stand as an acceptable surrogate for an individualized factual determination about the child's best interest. Indeed, the rule results in wrongful deprivations of liberty—i.e. deprivations of liberty that are not in the best interest of the child—not only in some cases, but in most cases. See *infra* part II.

Thus, in defending its policy and practice, the government focuses largely on the wrong question. It argues at length that it has a right to make decisions about the welfare of these children. Pet. Br. at 25-28. But no one has disputed that proposition. The due process problem presented here is that the government has attempted to make such determinations by adopting a general rule that—as the government ultimately concedes—is justified by nothing more than administrative convenience.¹² *Id.*

reason for release earlier. In such a circumstance, the close parallel between the finding of suicide may be allowed to create a presumption that persons are a danger to themselves, provided each individual is offered the opportunity to show why that presumption ought not be applied in an individual case.

¹² The INS's policy *appears* to vest some discretion in local officials to release children to responsible adults not appearing on the agen-

at 27. Rather than focus on supporting the interest that it claims to uphold—the interest of the child—it disclaims the ability to make that determination, choosing instead to spend its money on maintaining the children in custody at a substantially greater cost.

E. Administrative Convenience Cannot Justify These Blanket Deprivations Of Liberty.

So far as *amici* can tell, administrative convenience has never been allowed to support the confinement of a large class of individuals who otherwise have done nothing to warrant their being confined by the State. Consistent with principles of due process and recognition of children's "peculiar vulnerability," the INS cannot supplant constitutionally protected rights with administrative convenience:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy gov-

cy's list of eligibles, where "unusual and extraordinary" circumstances exist. In practice—as noted in Respondents' brief—those circumstances are never found except when the minor requires medical care. Thus, the standard set forth in the rule does not operate as a mere presumption. But even if it did, it would not be tolerable because it does not reflect the reality. In order to reflect the reality, the presumption ought to run the other way: upon the finding that there is a responsible adult willing to care for the child, the child ought to be released to that adult absent some reason not to release the child. That formulation, which mirrors the standard prescribed by the court below, parallels the *facts* with respect to the best interest of the child.

ernment officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).¹³ In *Stanley*, the Court held unconstitutional an Illinois statute under which children of unwed parents, upon the death of the mother, were declared wards of the State without any hearing on the father's fitness for custody. The Court held that even if the State's general presumption about the unfitness of unwed fathers was correct, not *all* fathers fell into that category, and that each father should, therefore, have an opportunity to make his case:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Id. at 656-57. The form of procedure by presumption which the INS applies here is no more protective of core liberty interests than that found invalid in *Stanley*. See generally *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2340-41 (1989).

The government nonetheless seems to argue that its presumption is justifiable because children are "always in some form of custody," and it is entitled to subordinate the child's interest to the government's *parens patriae*

¹³ INS's creation of a procedure to "deal with" the recent influx of alien children (Pet. Br. at 8-9) bears unfortunate resemblance to another body of procedures that this Court has criticized, the juvenile justice system, which

frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's.

McKeiver v. Pennsylvania, 403 U.S. 528, 544 n.5 (1971).

interest. Pet. Br. at 26-27. But this convenience-driven argument turns *parens patriae* on its head. *Parens patriae* gives the government the authority to act in a given field—here, for example, to assert the best interest of the child as a rationale for its actions—but it does not immunize irrational actions.¹⁴ Neither does it give the government license to subordinate the child's interest to its own. Yet that is what the government has done here, invoking *parens patriae* as the justification for adopting an "accommodation" under which it need not be put to the trouble and expense of making individual determinations that its actions actually serve the child's interests. *Parens patriae* is a grant of authority to preserve and promote the welfare of a child (see *Schall*, 467 U.S. at 265), not to disregard the child's interest in favor of the government's.

II. INS'S DETENTION POLICY DOES NOT CLOSELY PARALLEL A LEGITIMATE GOVERNMENT GOAL.

By any ordinary factual measure, the government's attempt to justify its rule as in the best interest of the child must fail.¹⁵

¹⁴ See, e.g., *In re Gault*, 387 U.S. 1, 16 (1967) ("The Latin phrase proved to be of great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."); *Kent v. United States*, 383 U.S. 541, 554-55 (1966) ("The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.").

¹⁵ *Amici* do not condemn all forms of detention or other types of residential care for children in a group setting. *Amicus* CWLA, for example, recognizes that residential care which combines a therapeutic environment with integrated treatment, educational, health care and other specialized services can be the most appropriate option for children with special social, psychological, developmental, and/or health problems. CWLA, *Standards for Residential Centers for Children* 15-16 (1982). Further, detention under conditions where there is a demonstrated need for safety and security, and

A. INS's Detention Policy Is Not Reasonably Related To A Legitimate Governmental Interest In The Welfare Of Children.

Despite the government's broad assertion that its rule is intended to benefit the affected children, the government has disdained any offer of factual support for its notion that the detention it provides, and which it describes in near glowing terms (Pet. Br. at 11-13), is actually beneficial, or that release to unrelated but responsible adults is harmful. To the contrary, the genesis of the rule shows that it was made, at most, on the basis of an INS intuition about what was appropriate, rather than any serious consideration of the important issues involved. See J.A. at 9-12.

Indeed, if the government were serious in its view that this type of detention were beneficial to children generally, then one would wonder why all children who are not currently in the care of a close relative or legal guardian are not being brought to similar detention centers. The government's practice of affording the benefits of incarceration only to *alien* children is woefully underinclusive.

B. The INS Denies Release To Adults Widely Recognized As Suitable To Care For Children.

The INS allows release of the child to parents, legal guardians, grandparents, brothers, sisters, aunts, and uncles, but not to other responsible adults who are available to serve as custodians. The INS standard thus ignores the value of the extended family in providing care and

where quality individualized care is provided, can also be an acceptable alternative. However, CWLA disfavors the routine detention imposed by the INS when the needs of the child can best be met through a substitute family or similar community alternative and when the child does not pose a danger to himself or the community.

support for children,¹⁶ placing this admittedly inexperienced agency at odds with model standards and federal and state statutes developed on the basis of more informed investigation and study.¹⁷

For example, the Law Enforcement Assistance Administration Standards on Adjudication limit shelter facility placement to instances in which the juvenile is in danger of imminent bodily harm with no available alternative to reduce the risk, or in which there is "no person willing and able to provide supervision and care" for the juvenile. U.S. Department of Justice, National Advisory Committee for Juvenile Justice and Delinquency Prevention, Standards for Administration of Juvenile Justice, Commentary to Standard 3.153 (1980). These standards authorize release to a "suitable person willing and able to provide supervision and care." *Id.* at 3.153. Similarly, the National Council on Crime and Delinquency ("NCCD") Standards and Guides for the Detention of Children and Youth require a search for persons who would accept responsibility for a child in custody, when parents cannot be located. NCCD 17 A (1961).

The INS's practice is also out of step with the federal statutory standard, 18 U.S.C. § 5034, which requires a

¹⁶ The INS policy fails to recognize the importance of godparents and other nonbiological "family" as responsible adults. In Hispanic family culture, godparents ("padrinos") are nonrelative adults who play a prominent role in the growth of the child, including providing a home for the child in the event of the parents' inability to provide care. Carlos Vidal, *Godparenting Among Hispanic Americans*, 67 Child Welfare 453, 457 (1988). Similarly, the policy fails to allow for assistance from religious organizations, to which many detained children would commonly turn for support. See Northwest Research Associates, *Active and Reasonable Efforts to Preserve Families* 28 (1986).

¹⁷ INS Regional Commissioner Ezell admitted having no experience in juvenile justice or detention, and also admitted never consulting federal judicial policies, state juvenile authorities, or anyone with expertise in the field, before implementing the policy. J.A. at 12.

magistrate to release a juvenile offender to "his parents, guardian, custodian, or other responsible party" (emphasis added) upon their promise to ensure the youth's appearance at scheduled hearings, and with other model standards.¹⁸ And the statutes of many states, including California's, require the use of the least restrictive alternative for a child taken into custody, and release to responsible adults or community organizations when no parent or guardian is available. Cal. Welf. & Inst. Code § 626(a), (b) (West 1992).¹⁹

¹⁸ See Model Juvenile Court Act § 14 (1985) (child shall not be subject to prehearing detention except to protect person or property of others or child or to prevent flight, or because there is "no parent, guardian, or custodian or other person able to provide supervision and care") (emphasis added); *id.* at cmt. (§ 14 is "consistent with not only current juvenile court acts but the modern trend not to hold persons in confinement unless necessary to assure their appearance in court").

¹⁹ The states are assuredly more familiar with these issues. State law is "plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Schall*, 467 U.S. at 268 (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952) and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

State law provides clear direction here: Ala. Code § 12-15-62 (1975) (allowing release to custody of "a parent, guardian, custodian or any other person who the court deems proper"); Conn. Gen. Stat. § 46b-133 (1986) (allowing release to "parent or parents, guardian or some other suitable person or agency"); D.C. Code Ann. § 16-2310 (1981) (allowing release to "parent, guardian, custodian, or other person or agency able to provide supervision and care for him"); Idaho Code § 16-1811.1(c) (1991) (allowing release to custody of "parent or other responsible adult"); Iowa Code § 232.19(2) (West 1985) (release to "parent, guardian, custodian, responsible adult relative, or other adult approved by the court"); Ky. Rev. Stat. Ann. § 610.200 (Michie 1990) (release to custody of "relative, guardian, person exercising custodial control or supervision or other responsible person"); Me. Rev. Stat. Ann. tit. 15, § 3203-A (West 1991) (release to "legal custodian or other suitable person"); Md. Cts. & Jud. Proc. Code Ann., § 3-814 (1989) (release to "parents, guardian, or custodian or to any other person designated by the court"); Mass. Gen. Laws Ann. ch. 119, § 67 (1969)

INS permits release to unrelated adults only if they are legal guardians of the child. 8 C.F.R. § 242.24(a)(1)(ii). The government asserts that release is inappropriate if the adult is "unwilling or unable to take steps necessary to become legal guardians." Pet. Br. at 18. Again, however, the government's focus is wrong. The only legitimate justification for detention is that it serve the child's best interests, not that the custodian has failed to prove his mettle by obtaining guardianship. In any event, guardianship is more akin to permanent custody than to the temporary custody which these children require in the interim between their arrest and their deportation hearings.²⁰ Because of the permanent consequences of the guardianship determination, it can take weeks to obtain—weeks which, but for INS's blanket rule, a child could spend under the care and custody of a responsible, con-

(release to "parent, guardian or any other reputable person"); Miss. Code Ann. § 43-21-301 (1981) (release to "any person or agency"); Minn. Stat. § 260.171 (West 1982) (release to "parent, guardian, custodian, or other suitable person"); Neb. Rev. Stat. § 43-253 (1988) (release to "parent, guardian, relative, or other responsible person"); Nev. Rev. Stat. Ann. § 62.170 (Michie 1986) (release to "parent or other responsible adult"); N.H. Rev. Stat. Ann. § 169.B:14 (1990) (release to relative, friend, foster home, group home, crisis home, or shelter-care facility); N.J. Stat. Ann. § 2A:4A-32 (West 1987) (release to relative); S.D. Codified Laws Ann. § 26-8-23 (1984) (release to probation officer or "any other suitable person appointed by the court"); S.C. Code Ann. § 20-7-560 (Law. Co-op. 1984) (release to "parent, a responsible adult, a responsible agency of a court-approved foster home, group home, facility, or program"); Tex. Fam. Code Ann. § 52.02 (West 1992) (release to "parent, guardian, custodian, or other responsible adult"); Utah Code Ann. § 78-3a-29 (1992) (release to "parent or other responsible adult").

²⁰ See, e.g., Unif. Guardianship and Protective Proceedings Act, § 2-104(a) (1982) (court may appoint guardian if all parental rights have been terminated or suspended by circumstances); Ala. Code § 26-2A-73(a) (1991) (same); Ariz. Rev. Stat. Ann. § 14-5204 (1975) (same); N.M. Stat. Ann. § 32-1-58(A) (Michie 1989) (permanent guardianship vests in the guardian all rights and responsibilities of a parent).

cerned adult. Moreover, because many of the adults who come forward to care for these children may be recent immigrants themselves, unfamiliar with our language and customs, it simply is not realistic to expect them to run a bureaucratic gauntlet and acquire legal guardianship to prove their willingness to care for the child.²¹

C. Incarceration And Detention Subject Children To Substantial Physical, Psychological, And Emotional Harm.

Detention is detrimental and should be a last resort, not the disposition of choice. Five decades of research have confirmed that "long term institutionalization in early childhood leads to recurrent problems in interpersonal relationships, high rates of personality disorders, and severe parenting difficulties later in life."²² North American Council on Adoptable Children, Research Brief 1, *Challenges to Child Welfare: Countering the Call for a Return to Orphanages* 2 (1990).

The duration of detention can correlate with other long-term effects upon children's ability to form close

²¹ Nor is a temporary guardianship a viable alternative. At the expiration of the "temporary" period, the guardianship may automatically expire, with no assurance of extension. See, e.g., *In the Matter of the Guardianship of Doe*, 786 P.2d 519 (Haw. 1990) (temporary guardianship may not last longer than ninety days); *Bagonzi v. Miller*, 401 A.2d 1086 (N.H. 1979) (temporary guardianship may not exceed sixty days). There are other state quirks as well. In this very case, for example, the Los Angeles Superior Court declared children in INS detention ineligible for temporary guardians.

²² Where, as here, a government entity has exceeded the limits of its administrative expertise, courts determining the reasonableness of a policy "must show deference to the judgment exercised by a qualified professional." *Youngberg*, 457 U.S. at 322. Such deference does not constitute judicial policymaking, as INS claims (Pet. Br. at 19), but rather is part and parcel of the need to determine whether the challenged practice violated a "fundamental" right. See *Snyder*, 291 U.S. at 105.

personal relationships, their social maturity, their performance on intelligence and developmental tests, and their ability to function in noninstitutionalized settings. *Id.* at 8-12. Deprivation of a secure attachment relationship with a primary caretaker may permanently impair a child's ability to form attachments, has been linked with poor school performance and delinquency, and may impair the child's intellectual curiosity, personality development, and ability to get along with peers. Michael S. Wald *et al.*, *Protecting Abused/Neglected Children: A Comparison of Home and Foster Placement* 10 (Stanford Center for the Study of Youth Development 1985). Thus, detention can significantly interfere with a child's ability to develop as a normal functioning adult.²³

Detention also diminishes children's image of their own self-worth. Juvenile justice experts have testified that children are far more vulnerable to emotional pressure than are mature adults. *See Lollis v. New York State Dep't of Social Servs.*, 322 F. Supp. 473, 481 (S.D.N.Y. 1970) (expert testimony). An adult who has not been through the experience has difficulty appreciating "the terror that engulfs a youngster the first time he loses

²³ Detention distorts a child's sense of time. Children may not appreciate the purpose and duration of their detention. "The lack of sensory stimuli, extended periods of absolute silence or outbreaks of hostility, foul odors and public commodes, as well as inactivity and empty time constitute an intolerable environment for a child." Mark Soler *et al.*, *Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails*, B.Y.U. L. Rev. 1, 6 (1980). Decisions bearing on their detention "should never exceed the time that the child to-be-placed can endure loss and uncertainty." Goldstein, *supra*, at 42. Children have a built-in time sense based on the urgency of their instinctual and emotional needs, *id.* at 40, prompting one court to find it "difficult to reconcile the practice of detaining a child one to six months prior to the juvenile court hearing with the protective philosophy of the juvenile court." *In re Robin M.*, 579 P.2d 1, 3 (Cal. 1978) (quoting Governor's Special Study Commission on Juvenile Justice, *Part I—Recommendations for Changes in California's Juvenile Court Law* 28 (1960)).

his liberty and has to spend the night or several days or weeks in a cold impersonal cell or room away from home or family." *In re William M.*, 473 P.2d 737, 747 n.25 (Cal. 1970) (quoting expert testimony). The experience tells the minor that he is "no good" and that society has rejected him, and he responds accordingly, living down to society's seemingly diminished expectations. *Id.* The lack of privacy inherent in detention further communicates to the children that they are "not trustworthy, . . . not responsible, . . . not deserving of being treated with basic dignity . . . and when we communicate to somebody that he is untrustworthy, or not to be trusted, he will engage in untrustworthy behavior." *Morgan v. Sproat*, 432 F. Supp. 1130, 1149 n.40 (S.D. Miss. 1977) (quoting expert testimony). Summing up the problem in the context of the failures of the juvenile justice system, this Court noted that although the system in theory had noble goals, "[i]n fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses." *McKeiver*, 403 U.S. at 544 n.5.²⁴

Besides impairing a child's emotional development and denigrating his image of self-worth, detention also fails to address a child's need for "family." Children, unlike adults, have no psychological concept of relationship by blood tie until late in their development. Instead, "[w]hat

²⁴ INS's practice conflicts with state judicial recognition of the need for individualized determination to foreclose resort to unnecessary detention. *See, e.g., Jones v. Maryland*, 535 A.2d 471 (Md. 1988) (expressing preference for releasing child to parents, guardian, or other persons instead of detaining him); *Glenda Kay S. v. Nevada*, 732 P.2d 1356 (Nev. 1987) (placement of 13-year-old in training center because of minor offense violated preference for home placement); *R.P. v. Alaska*, 718 P.2d 168 (Alaska App. 1986) (state bears burden of proving that less restrictive alternatives are unavailable); *Morris v. D'Amario*, 416 A.2d 137 (R.I. 1980) (state's placement of arrested child is subject to strict scrutiny to determine whether least restrictive placement used); *In re John H.*, 48 A.D.2d 879, 369 N.Y.S.2d 196 (1975) (state must fully explore options other than detention).

registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached." Goldstein, *supra*, at 12-13. Unless "family, natural or of the heart, is involved in the treatment and life of the child, it is impossible or at best difficult for the child to be reintegrated into home and community." *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1215 (E.D. La. 1976). Thus, it is important that the law identify "who, among presently available adults, is or has the capacity to become a psychological parent and thus will enable a child to feel wanted." Goldstein, *supra*, at 51 (emphasis in text).

III. INS'S INCARCERATION AND DETENTION OF CHILDREN WITHOUT A HEARING VIOLATES THEIR RIGHT TO PROCEDURAL DUE PROCESS.

Because, as we have explained, INS's blanket detention policy without an individualized hearing deprives these children of a substantive due process right, it necessarily follows that the policy denies their right to procedural due process as well.²⁵ If the child has a substantive right to be released absent a determination that detention is in the child's best interest, then a hearing addressing that

²⁵ The INS claims that it lacks the administrative resources and expertise to conduct "the home visits necessary to make reliable guardianship determinations." Pet. Br. at 27-28. But the court below did not require INS to engage in a full-scale custodial inquiry, but merely to inquire "whether any non-relative who offers to take custody represents a danger to the child's well-being." *Flores*, 942 F.2d at 1364. The INS offers no explanation why funds currently being used to maintain the detention facilities could not just as readily be used for referral of the children to other persons or agencies, such as licensed youth-serving agencies or recognized church groups, which have the expertise to screen potential custodians. Further, conducting hearings would not impose a new kind of administrative burden. The agency already must make allowance for hearings, because even absent the court order, it must hold a hearing if the child requests one. See Pet. Br. at 36.

interest must be afforded shortly after the detention is commenced. See *Flores*, 942 F.2d at 1364.

The government protests, of course, that the child already has an opportunity for a hearing. But as a practical matter, these children have no such opportunity, because obtaining the hearing depends on each child's exercise of mature judgment—precisely the trait whose absence, according to INS, justifies the agency's intervention *parens patriae*. As the INS tortuously puts it:

[T]he juvenile can choose to forego such a hearing only by declining to check a box that expressly states: "[I] do request a redetermination by an Immigration Judge of the custody decision."

Pet. Br. at 36. In other words, the child waives the hearing unless he specifically requests it, an arrangement that stands the law on its head.

It is the *government's* burden to justify the deprivation of liberty, not the child's to check the "right" box on a piece of paper and thus preserve his right to freedom. A child's waiver of a fundamental right must occur through an uncoerced, affirmative, informed decision, *Kent*, 383 U.S. at 556-57, not through mere omission. The likelihood of invalid waiver is especially high given the circumstances in which it is typically executed: the child will have just been taken into custody in a strange country, probably knows little if any English, may well be illiterate in his native language, and will be highly susceptible to doing whatever he thinks will please his captors, rather than making an informed decision in his own best interests. In prescribing that the issue of the suitability of release to a responsible adult affirmatively be addressed by the INS in every case, the court below did nothing more than prescribe the constitutional minimum necessary to protect the child's interest.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR,
Attorney General of the United States, *et al.*,
Petitioners,

v.

JENNY LISETTE FLORES, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF AMICUS CURIAE OF THE
AMERICAN BAR ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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IN THE
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**On Writ of Certiorari to the
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**BRIEF AMICUS CURIAE OF THE
AMERICAN BAR ASSOCIATION
IN SUPPORT OF RESPONDENTS**

STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. The more than 360,000 members of the ABA come from every state and territory and the District of Columbia. The ABA's constituency includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges on the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in related fields.

Since its inception over one hundred years ago, the ABA has taken an active interest in the improvement of

the juvenile justice system. To further this interest, the ABA, in cooperation with the Institute of Judicial Administration ("IJA"), formed a Joint Commission on Juvenile Justice Standards in February 1973. The purpose of the Joint Commission was to develop a set of standards for every phase of the administration of the juvenile justice system.

More than one hundred lawyers, judges and specialists in the areas of social work, psychology, education, sociology, psychiatry, and juvenile justice contributed to the drafting and review of proposed standards. Tentative drafts were disseminated by the Joint Commission to members of the legal community, juvenile justice specialists, and organizations concerned with the juvenile justice system for review and comment. The work of the Joint Commission culminated in the publication of twenty-three volumes of standards relating to almost every aspect of the administration of juvenile justice. The House of Delegates of the ABA approved twenty of the twenty-three volumes as the official policy of the ABA in 1979, including *Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition* (hereinafter "ABA Standards"). This volume includes comprehensive substantive and procedural standards governing the pre-disposition detention of accused juvenile offenders. The ABA considers pre-disposition detention of juveniles "one of the most serious problems in the administration of juvenile justice." ABA Standards at 1.

The ABA also has a long-standing interest in immigration policy issues and in the fair enforcement and implementation of the nation's immigration laws. Consistent with these interests, the ABA's policymaking House of Delegates created the Coordinating Committee on Immigration Law (the "Coordinating Committee") in 1983. The Coordinating Committee is comprised of representatives of nine ABA entities with specialized expertise

(e.g., immigration law and policy and administrative law).

In 1989, the Coordinating Committee focused directly on conditions in Immigration and Naturalization Service ("INS") detention facilities in south Texas, the nation's largest detention area, by sponsoring a delegation of representatives of the ABA, the State Bar of Texas and the American Immigration Lawyers Association to gather information and investigate conditions at specific facilities. Based on this investigation, the ABA delegation recommended that INS detain aliens "only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings." ABA Coordinating Committee on Immigration Law, *Lives on the Line: Seeking Asylum In South Texas* 3 (July 1989).

The ABA participates as *amicus curiae* to call upon this Court to protect the policies reflected in the ABA Standards. The ABA respectfully suggests that the indefinite detention of juveniles, as permitted by the regulation at issue here without even the most rudimentary procedural safeguards, is directly contrary to fundamental concepts of due process, which are reflected in the ABA Standards as well as those of various other well-recognized child welfare organizations.

The ABA has received the consent of all parties to this case to present its views.

SUMMARY OF ARGUMENT

This case involves INS' policy of indefinitely detaining juveniles for whom alternative custodial arrangements are available and who pose no threat to the community or risk of flight. Pursuant to this policy, Jenny Flores and countless other alien juveniles have been deprived of their physical freedom in secure INS detention facilities simply because they have no adult relative or other "approved" custodian willing to come forward.

This policy, and the regulation that codifies it, plainly violate both the substantive and procedural components of the Fifth Amendment's guarantee of due process. Freedom from physical detention lies at the "core" of the liberty interests protected by the Due Process Clause. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992). Accordingly, the government may deprive an individual of that interest only if it can demonstrate that such deprivation actually serves a significant and legitimate objective. In an argument that strains all credulity, INS' only asserted justification is that indefinite incarceration in secure detention facilities promotes the welfare of juveniles. That contention is antithetical to universally-accepted juvenile justice standards, including numerous standards promulgated by the ABA—all of which embody the principle that detention *undermines* rather than serves the interests of juveniles. The incontrovertible nature of this premise confirms that Petitioners' argument is essentially one of administrative convenience: INS is simply unwilling to make individualized determinations as to what would serve the best interest of each child. As both this Court has held and the ABA Standards have recognized, however, the goal of greater administrative efficiency is insufficient to justify the indefinite deprivation of physical liberty.

Moreover, when a deprivation of a right secured by the Due Process Clause is at issue, the quantum of procedure used to enforce that deprivation must reflect the importance of the right. Although, under INS policy, juveniles are being denied their physical liberty and treated essentially as detained criminals, INS does not afford any individualized determination that such measures are either necessary or appropriate. Under the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the failure to provide an automatic hearing before a neutral decisionmaker deprives Respondents of the procedural protections mandated by the Due Process Clause. That legal conclusion is echoed in various ABA standards,

all of which reflect the policy judgment that juveniles need an automatic hearing before a neutral third party to protect against the arbitrary or wrongful deprivation of liberty.

Although the ABA Standards establish specific procedural and substantive criteria that the ABA considers prudent as a matter of public policy, the ABA does not contend that these standards are the only ones that comport with requirements of due process. Nevertheless, the ABA Standards are relevant to the constitutional analysis of the issues presented in this case. These standards were the result of the comprehensive effort of hundreds of attorneys, judges and experts to develop standards that represented a balanced resolution of the serious societal problem presented by pre-disposition detention. Moreover, the substantive and procedural standards reflected in the ABA Standards are consistent with the detention standards adopted by a number of organizations concerned with child welfare issues and promulgated by Congress and state legislators. Although 8 C.F.R. § 242.24 is not unconstitutional simply because it is inconsistent with the ABA's position, the fact that the regulation differs so radically from these carefully considered standards should be given weight by this Court in its constitutional analysis.

ARGUMENT

I. THE INDEFINITE DETENTION OF JUVENILES FOR WHOM ALTERNATIVE CUSTODIAL ARRANGEMENTS ARE AVAILABLE IS INCONSISTENT WITH SUBSTANTIVE DUE PROCESS.

Pursuant to 8 C.F.R. § 242.24, juveniles not charged with any crime but suspected of being deportable aliens may be indefinitely detained against their will in secure facilities unless INS, in its discretion, authorizes their release. Such a deprivation of physical freedom, in which every aspect of one's life is subject to control by the government, plainly implicates a liberty interest protected

by the Due Process Clause of the Fifth Amendment. As the Court observed only weeks ago, “[f]reedom from bodily restraint” lies at the “core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992) (citation omitted).¹

As the Court also reaffirmed in *Foucha*, once a liberty interest is established, “the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” *Foucha*, 112 S. Ct. at 1785 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)); see also *Addington v. Texas*, 441 U.S. 418 (1979); *Jackson v. Indiana*, 406 U.S. 715 (1972). Whether a case falls within one of the “carefully limited exceptions” to the norm of liberty depends on two related considerations. *Foucha*, 112 S. Ct. at 1787 (quoting *Salerno*, 481 U.S. at 755). First, restrictions on physical liberty, at a minimum, must serve a significant and legitimate governmental interest. Thus, for example, in *Schall*, the Court approved a brief restriction on liberty based on the “‘legitimate and compelling state interest’ in protecting the community from crime.” *Schall v. Martin*, 467 U.S. 253, 264 (1984); see also *Salerno*, 481 U.S. at 750. Second, even where such an interest exists, the conditions of confinement must actually serve that interest. As the Court stressed in *Schall*, “the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment . . . [Rather, it is] necessary to determine whether the terms and conditions of confinement under [the stat-

¹ The core nature of the interest in physical liberty is confirmed in other recent decisions of this Court, which also recognize that an individual’s interest in liberty is “importan[t] and fundamental.” See, e.g., *United States v. Salerno*, 481 U.S. 739, 750 (1987). Indeed, many other rights recognized by the Court as “fundamental” are meaningless in the absence of physical liberty. See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (right to travel).

ute] are in fact compatible” with the purposes allegedly served. *Schall*, 467 U.S. at 269; see also *Foucha*, 112 S. Ct. at 1781 (“[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed”).

Under these principles, the long-term detention of juveniles in INS detention facilities pursuant to 8 C.F.R. § 242.24 plainly violates due process. First, contrary to Petitioners’ assertions, INS’ policy of indefinite detention does not promote the best interests of juveniles. As the ABA Standards and the standards of numerous other organizations and entities establish, detention, far from promoting the welfare of juveniles, is presumptively injurious to it. Second, as the ABA Standards also confirm, the conditions imposed in INS detention facilities are inconsistent with INS’ purported interest in advancing the welfare of juveniles. Indeed, scrutiny of the regulation and its purported justification confirms that INS’ only real interest is in *avoiding* an individualized determination of the juveniles’ best interests—a governmental interest that is plainly inadequate to support the challenged deprivation.

A. The Regulation Does Not Serve A Legitimate Or Significant Government Interest.

The only justification for 8 C.F.R. § 242.24 now asserted by Petitioners is an alleged concern for the welfare of juvenile detainees.² Pet. Br. at 23-24. While that interest is, of course, both legitimate and substantial, INS’

² It is undisputed that the most compelling justification for detention—the need to protect the public from crime—is absent in this case. Pet. App. at 49a. Thus, this case stands in sharp contrast to the cases principally relied upon by Petitioners, where the Court approved brief restrictions on liberty that were narrowly focused to serve the government’s weighty interest in preventing crime. See *Salerno*, 481 U.S. at 749; *Schall*, 467 U.S. at 264. Similarly, it is undisputed that detention is not necessary to secure the attendance of juveniles at deportation hearings. See Pet. App. at 8a.

policy directly *undermines* rather than serves it.³ Indeed, to the extent that Petitioners are contending that detention, *per se*, is in the best interests of juveniles—or even that detention is preferable to release to qualified unrelated adults or charitable organizations—the argument is absurd on its face.⁴

As the ABA Standards recognize, detention in fact is contrary to the best interests of juveniles:

Restraints on the freedom of accused juveniles pending trial and disposition are generally contrary to public policy. The preferred course in each case should be unconditional release.

ABA Standards, standard 3:1.⁵ The policy favoring release is reflected throughout the ABA Standards, which provide for mandatory release at each successive stage

³ Earlier in this litigation, Petitioners also attempted to justify the deprivation of liberty permitted by 8 C.F.R. § 242.24 by contending that a contrary rule might expose INS to liability in tort for harm to juveniles who were released to unrelated adults. See Pet. App. at 20a. Petitioners now have abandoned this claim. The evolution of INS' position, however, does suggest that INS is merely engaged in a *post hoc* attempt to find an acceptable basis for its policy in the absence of a traditionally appropriate concern such as fear of crime or escape.

⁴ In their Brief, Petitioners understandably seek to avoid any inquiry as to whether the policy advances their purported rationale. Rather, they suggest that INS' "findings" should be essentially determinative. See Pet. Br. at 24. However, *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), does not support the proposition that the Court should rubber-stamp choices made by the Executive Branch and accept any rationale at face value. This is particularly true where, as here, the Record demonstrates that the rationale advanced is totally at odds with the effect of the policy. This Court frequently has looked beyond the interest asserted by the government in order to ascertain whether the regulation serves that interest or some unstated, improper interest. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

⁵ Portions of the ABA Standards as well as other child welfare standards referenced herein are reproduced in the Appendix.

of juvenile pre-trial proceedings unless certain findings—none of which is applicable to Respondents here—are made.⁶ See ABA Standards, standards 5.1, 6.4, 6.6 and 7.7.

The ABA Standards are far from unique in recognizing that the welfare of juveniles cannot truly be served, as Petitioners now appear to assert, by detention in secure facilities. The United Nations Convention on the Rights of the Child, which was endorsed last year by the ABA, reached precisely the same conclusion:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.

See United Nations, Convention on the Rights of the Child, Art. 37(b) (hereinafter "U.N. Convention") (*reprinted in C. Cohen & H. Davidson, Children's Rights in America: U.N. Convention on the Rights of the Child Compared With United States Law* (1990)).

The Department of Justice itself adopted standards in July 1980 that address the detention of juveniles. See United States Department of Justice, *Standards for the Administration of Juvenile Justice* (1980) (hereinafter "DOJ Standards"). Consistent with the ABA's position, the DOJ Standards recognize:

the harsh impact that even brief detention may have on a juvenile, especially when he/she is placed in a

⁶ Under these standards, detention is authorized only in cases that involve an alleged criminal offense that would be a felony for an adult and where either: (1) the crime charged is a class one juvenile offense involving violence; (2) the juvenile is a fugitive from an institution; or (3) the juvenile has compiled a demonstrable record of willful failure to appear at juvenile proceedings. See *id.*, standard 6.6. None of these exceptions is applicable to Respondents here.

secure facility, and the corresponding need to assure as quickly as possible that such detention is necessary.

DOJ Standards, standard 3.155, commentary.

The policies reflected in the ABA Standards are also consistent with federal and state law regarding the detention of juveniles. For instance, the Juvenile Justice and Delinquency Prevention Act ties federal funding to the development of statewide programs that "increase the use of nonsecure community-based facilities and discourage the use of secure incarceration and detention." 42 U.S.C. § 5633(a)(10)(H)(iv). Similarly, in the non-criminal context, the Adoption Assistance and Child Welfare Act promotes the placement of juveniles in the "least restrictive (most family like) setting . . ." 42 U.S.C. § 675(5)(A); see also 42 U.S.C. § 671(a)(1). In addition, a number of state legislatures have adopted release provisions comparable to those contained in the ABA Standards.⁸

INS thus stands alone in its contention that incarceration in detention facilities best serves the interests of juvenile detainees. As evidenced by the position of the ABA, other state and federal entities, as well as a uni-

⁷ The ABA has endorsed the Adoption Assistance and Child Welfare Act.

⁸ See, e.g., Va. Code Ann. § 16.1-248.1 (child may be detained in secure facility only upon a finding that there is probable cause to believe that the child committed the act alleged and that (1) the release of the child would constitute an unreasonable danger to the person or property of others or to the child's life or health or (2) the child has threatened to abscond from the jurisdiction); Fla. Stat. § 39.002(4) ("detention . . . should be used only when less restrictive interim placement alternatives prior to adjudication and disposition are not appropriate . . . and be limited to situations where there is clear and compelling evidence that a child presents a risk of failing to appear or presents a substantial risk of inflicting bodily harm on others . . . , presents a history of committing a serious property offense prior to adjudication, disposition, or placement, or requests protection from imminent bodily harm").

form chorus of child welfare organizations, a policy resulting in the presumptive detention of juveniles plainly does not serve any legitimate interest in the welfare of children.

The facial implausibility of INS' purported justification is underscored by the conditions of confinement prevalent at the secure detention facilities operated by or for INS. As the record amply demonstrates, juveniles held in such facilities are denied all of the essential attributes of freedom. They are routinely denied any opportunity to attend school, to engage in recreational activities or to receive telephone calls or visitors. See Pet. App. at 32a, 139a; J.A. at 14, 26. Many have been subjected to strip searches and commingled with adults and members of the opposite sex. See Pet. App. at 118a; J.A. at 16, 17, 24-25; see generally *Flores v. Meese*, 942 F.2d 1352, 1367-68 (9th Cir. 1991) (Tang, J., concurring) (describing conditions of INS facilities and "adverse consequences" of detention) (Pet. App. at 32a).⁹ Although Petitioners suggest—mostly from outside the Record—that conditions at INS facilities have improved,¹⁰ there is no dispute that

⁹ The ABA Standards again provide a useful reference. In contrast to INS facilities, where juveniles and adults of both sexes have been commingled, the ABA Standards provide that "[t]he interim detention of accused juveniles in any facility or part thereof also used to detain adults is prohibited." ABA Standards, standard 10.2. Similarly, the ABA Standards recognize the particular importance to juvenile detainees of privacy, education, and access to visitors and telephones. See ABA Standards, standards 10.6-10.7. The Record demonstrates that INS detention facilities fail to satisfy any of these standards.

¹⁰ Petitioners labor mightily to convey the impression that the juveniles' interest is of diminished significance in light of the allegedly salutary conditions in INS detention facilities. Petitioners contend that, pursuant to a 1987 consent decree between INS and Respondents (hereinafter "Detention Memorandum"), INS must "establish a network of community based shelter care programs" that "provide a safe and appropriate environment for alien minors." Pet. Br. at 11-14. Petitioners neglect to reveal, however, that the

these deplorable conditions existed at the same time that INS was asserting that it was holding juveniles in these facilities to further their welfare.

B. Administrative Convenience Is Not A Sufficient Interest To Justify The Indefinite Detention Of Juveniles For Whom Alternative Custodial Arrangements Are Available.

In short, INS cannot sustain the deprivation of liberty effected by 8 C.F.R. § 242.24 on the grounds that indefinite detention under these conditions actually promotes or even protects the welfare of detained juveniles. To do so flies in the face of common sense, the position of all recognized authorities (including the ABA Standards), and the evidence in the record concerning the actual conditions permitted at these facilities.

Accordingly, INS' blanket restriction on release, except to parents and certain others, must be recognized for what it is: a policy motivated solely by the convenience of avoiding individualized determinations as to whether release is *in fact* in the best interests of any given detained

provisions contained in the Detention Memorandum are not mandatory. In the six years since it was executed, INS has made no effort to codify the standards prescribed in the Detention Memorandum. In fact, when it promulgated 8 C.F.R. § 242.24, INS expressly refused to incorporate any standards relating to conditions of detention. INS determined that "[s]tandards of confinement are beyond the scope of this particular rule which is limited to processing and release." 53 Fed. Reg. 17,450 (1988). Thus, INS practices in connection with the juvenile detention facilities are governed exclusively by internal policies and INS is free to revert to the practices documented in the Record at any time.

In fact, it is unclear from the Record whether any of these internal policies have been implemented by INS. Petitioners state that INS "*generally has adhered to the policies set forth in the [Detention Memorandum] on a nationwide basis.*" Pet. Br. at 11 n.15 (emphasis added). However, Petitioners have not presented any evidence to support their argument that conditions have improved in INS detention facilities.

juvenile. As Petitioners themselves characterize their interest, "INS has neither the administrative resources nor the expertise to conduct the home visits necessary to make reliable guardianship determinations." Pet. Br. at 27-28.

Even accepting Petitioners' argument at face value, a lack of administrative resources does not provide a sufficient basis to justify an extended deprivation of liberty. As this Court has observed in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (footnote omitted):

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

In *Stanley*, the Court invalidated on due process grounds a state statute that effectively precluded an individualized determination as to whether a father was an appropriate guardian after the child's mother died. The Court noted that "[p]rocedure by presumption is always cheaper and easier than individualized determination," but found that an individualized determination was required by due process. *Id.* at 656-57. The same principle controls here.

The ABA Standards also reinforce the constitutional imperative that administrative convenience may not provide a proper basis for the detention of juveniles:

[T]he absence of funds cannot be a justification for resources or procedures that fall below the standards or unnecessarily infringe on individual liberty. Accused juveniles should be released or placed under

less restrictive control whenever a form of detention or control otherwise appropriate is unavailable to the decision maker.

ABA Standards, standard 3.6.

In short, INS cannot justify the protracted detention of juveniles on the ground that it is unwilling or unable to make an individualized determination as to whether release is appropriate.¹⁴

II. THE INDEFINITE DETENTION OF JUVENILES WITHOUT A ROUTINE INDIVIDUALIZED DETERMINATION OF WHETHER THEIR BEST INTERESTS ARE SERVED BY CONTINUED DETENTION VIOLATES FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS.

The cursory procedural protections afforded by 8 C.F.R. § 242.24 also are plainly insufficient to satisfy the procedural guarantees of the Due Process Clause. Under the now-familiar test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the degree of procedural protection mandated by the Fifth Amendment requires consideration of three factors: (1) the private interests involved; (2) the risk that current procedures will result in the erroneous deprivation of those interests and the probable value of additional or alternative procedural safeguards; and (3) the government's interest in maintaining current procedures. Applying these factors, due process, at a minimum, requires that INS afford juvenile detainees an individualized hearing on whether their best interests are

¹⁴ It is noteworthy that Petitioners have submitted no evidence in support of their claim of administrative burden. In their Petition for a Writ of Certiorari, Petitioners cited a number of statistics in support of their argument that individualized review would impose a significant administrative burden on INS. See Petition for Writ of Certiorari at 25. Now that these statistics have been retracted, there is no factual evidence before the Court in support of Petitioners' claim of administrative burden. See Pet. Reply Br. at 1-2 n.1.

served by release to an unrelated adult (including any available church or charitable organization) or detention in an INS facility.

A. Juveniles Have A Significant Interest In Avoiding Detention In INS Facilities.

Under 8 C.F.R. § 242.24, juvenile detainees who present no danger to the community and no risk of flight not only are deprived of their physical freedom, but are often exposed to extraordinarily harsh conditions. See *supra* at 11-12. Thus, Petitioners do not, and could not, dispute that the private interest at issue in this case is substantial. Indeed, as discussed *supra*, freedom from detention is at the core of the liberty interests protected by the Due Process Clause. See *supra* at 6.

In addition to the substantial interest in maintaining their freedom, juveniles have an interest in enhancing their ability to consult with counsel and to prepare a defense in the deportation hearing. For those juveniles who are represented by counsel, the restrictive conditions in INS facilities effectively limit their ability to consult with him or her. As this Court has recognized, when an individual is detained, he or she is "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (footnote omitted). Consistent with this observation, juveniles detained by INS are not free to leave the facility to collect necessary evidence, interview witnesses and perform the other functions necessary for the preparation of their defense. See *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (conditions in INS detention facilities impair access to counsel).

Moreover, detention can have the effect of diminishing the likelihood, already slim, of ever retaining counsel. Although juveniles may face torture, imprisonment or political persecution in their home country as a result of deportation, the Immigration and Naturalization Act

does not authorize the appointment of counsel at the government's expense in any deportation proceeding. See 8 U.S.C. § 1362. As a result, most detained aliens fail to obtain representation prior to their deportation hearing. The great majority of the juveniles in INS detention are impoverished and reside in detention facilities that are located in remote areas of the country where little, if any, free legal assistance is available. See Note, *INS Transfer Policy: Interference With Detained Aliens' Due Process Right To Retain Counsel*, 100 Harv. L. Rev. 2001, 2005 (1987).

The presence of counsel can significantly affect the outcome of a deportation proceeding. INS regulations are complicated and detainees are often undereducated and unfamiliar with either the English language or the American legal system.¹² Perhaps for that reason, an alien who receives legal representation during his or her deportation proceeding is more than three times as likely to receive asylum from an immigration judge than an unrepresented applicant. See General Accounting Office, *Asylum: Approval Rates for Selected Applicants*, Appendix, Table 1.1 (GAO June 1987). Based upon its study of conditions in detention facilities in south Texas, the ABA concluded that "the participation of counsel is a highly determinative factor in ensuring that bona fide applicants receive the full and fair asylum adjudications to which they are entitled." See ABA Coordinating Committee on Immigration Law, *Lives on the Line: Seeking Asylum in South Texas* 3 (July 1989).

¹² As this Court has noted, potential deportees constitute "a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950).

B. Existing Procedure Does Not Protect Juvenile Detainees From The Risk Of Erroneous Deprivation.

Under current INS procedures, INS fails to afford juvenile detainees any meaningful opportunity for review by a neutral third party.¹³ As Petitioners themselves concede, an INS enforcement officer—in some cases the arresting officer—makes the initial detention determination when a juvenile is taken into custody. See 8 C.F.R. § 242.24(c).¹⁴ Moreover, the regulation does not provide for automatic review of this initial detention decision. Rather, juveniles are afforded a hearing before an immigration judge on the detention decision only if such a hearing is requested by selecting the appropriate box on a complicated form. See 8 C.F.R. § 242.2(d).¹⁵

¹³ Petitioners suggest that juveniles are afforded elaborate procedures once they are taken into custody by INS. See Pet. Br. at 3-8. Petitioners fail to reveal, however, that only two of the procedures described to the Court—procedures providing for an initial detention determination and the option of a hearing before an immigration judge—are even remotely related to the detention determination. The remaining procedures relate exclusively to juveniles' option to waive their right to a due process deportation hearing and elect voluntary departure.

¹⁴ This INS officer determines whether: (1) the juvenile is eligible for release on bond, parole or recognizance and (2) a parent, guardian or adult relative is available to take custody of the juvenile. *Id.*, § 242.24(b).

¹⁵ Pet. Br., App. at 8a. Unlike the forms relating to voluntary deportation, this form is not in simple language that might be understood by a juvenile. In pertinent part, the form provides that:

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be [the form then specifies

This "option" of a custody redetermination hearing is of little practical consequence since juveniles cannot reasonably be expected to comprehend the nature of the procedure.¹⁶ As this Court has observed in a related context, a person voluntarily committing himself or herself to a hospital "who is willing to sign forms but is incapable of making an informed decision is, by the same token, unlikely to benefit from [his or her] statutory right to request discharge." *Zinerman v. Burch*, 494 U.S. 113, 133 (1990); see also *Flores v. Meese*, 942 F.2d 1352, 1368 n.3 (9th Cir. 1991) (Tang, J., concurring) ("[n]o matter how elaborate and accurate the . . . proceedings available under the [regulation] may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first

whether the juvenile will be detained in INS custody, released on recognizance or released on bond.]

You may request the Immigration Judge to redetermine this decision.

Id.

¹⁶ There is no indication in the Record that INS explains the consequences of electing a hearing before an immigration judge. Nor can children, who are obviously unfamiliar with the United States' legal system and administrative procedure, reasonably be expected to understand such procedures. These juveniles cannot be expected to comprehend laws that confound even the most respected federal judges. See *Dong Sik Kwon v. INS*, 646 F.2d 909, 919 (5th Cir. 1981) ("[w]hatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon"); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) ("[w]e have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos' labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges").

place") (quoting *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981)).

As this Court's decisions, which are echoed by the ABA Standards, make clear, these procedures create an unacceptably high risk of erroneous deprivation of the affected liberty interest. Where, as here, the core interest in freedom from restraint is involved, the Court has generally required a hearing before a neutral and detached decisionmaker. Thus, for example, in *Salerno*, the Court upheld procedures that afforded arrestees procedural protections including a "full-blown adversary hearing" in which the government was required to prove by clear and convincing evidence that no conditions of release could reasonably assure the safety of the community. Similarly, in upholding the New York statute at issue in *Schall*, the Court relied on the range of procedural protections provided to juveniles, including an individual probable cause hearing to determine whether he or she posed a threat to the community.¹⁷ *Schall*, 467 U.S. at 262; see also *Parham v. J.R.*, 442 U.S. 584, 605 (1979) (commitment decision of parent or guardian must be reviewed by a neutral decisionmaker); *In re Gault*, 387 U.S. 1, 30 (1967) (juveniles confronted with incarceration must be afforded a hearing containing the essentials of due process and fair treatment).

The ABA Standards similarly prescribe detailed procedures governing the pre-disposition detention of juveniles. Under standard 6.5(D), the intake official is required to reach an initial status decision and determine

¹⁷ The statute provided for a limited pre-trial detention period and an expedited fact-finding hearing. During the period of confinement, juveniles were placed in carefully regulated conditions and were provided educational and recreational opportunities. *Schall*, 467 U.S. at 262; see also *Foucha*, 112 S. Ct. at 1787 (invalidating state statute that authorized indefinite commitment because acquttee was not afforded adequate procedural protections).

whether the juvenile is eligible for release. If the intake official determines that the juvenile is subject to detention, that official must file a petition for a release hearing within twenty-four hours and the juvenile must be afforded a hearing in court within a day of the filing of such petition. *Id.*, standard 7.6. The juvenile must also be provided with notice of the hearing, the right to legal counsel and access to the information on which the judge will base his or her determination. *Id.* At the hearing, the government has the burden of demonstrating that there is probable cause to believe that the juvenile committed the offense charged. *Id.* Release is mandatory if the government fails to make a showing of probable cause or release is required under prescribed detention standards. *Id.* The court is then required to hold a detention review hearing at or before the end of each seven-day period following the initial detention hearing. *Id.*, standard 7.9.

The procedures contained in the ABA Standards are consistent with those recommended by organizations concerned with child welfare issues. Under the DOJ Standards, a juvenile taken into custody must be afforded a detention hearing before a family court judge within twenty-four hours. DOJ Standards, standard 3.155. The DOJ Standards also provide that "[u]nless the state demonstrates by clear and convincing evidence that continued secure or nonsecure detention is warranted, the court should place the juvenile in the least restrictive form of release." *Id.* Moreover, the DOJ Standards require a review hearing at or before the end of each seven-day period during which the juvenile remains in secure detention. *Id.*, standard 3.158. Similarly, the United Nations Convention on the Rights of the Child provides that:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appro-

priate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

U.N. Convention, Art. 37(d). As all of these standards reflect, in the absence of a hearing before a neutral decisionmaker, the risk of erroneous deprivation of liberty is unacceptably high.

C. Petitioners Do Not Have A Strong Interest In Denying Juvenile Detainees An Individualized Determination Of Their Best Interests.

Petitioners have not established any substantial countervailing interest in denying juveniles automatic and individualized review. Petitioners assert in conclusory fashion that the "fiscal and administrative burdens" of an automatic hearing requirement would be substantial. *See* Pet. Br. at 37. This bald assertion is insufficient to establish a "strong interest" in present INS procedures. As discussed *supra*, there is no evidence in the Record documenting either the existence or magnitude of the claimed burden of an individualized hearing. *See, supra* at 14 n.11.

Furthermore, it is by no means obvious that an individualized hearing would impose any additional costs or administrative burdens on INS—even if such costs are assumed to be relevant to the constitutional question. INS is currently providing a hearing to juvenile detainees on an optional basis. *See* 8 C.F.R. § 242.2(d). A system of immigration judges is thus already in place. Moreover, it is at best unclear how the extension of INS' existing system of review would be more costly than the \$100 per day required to house juveniles in INS facilities. Even if such burden could be documented, the magnitude of the individual's liberty interest and the risk of erroneous deprivation inherent in current procedures clearly outweigh the marginal burden of providing mandatory hearings before a neutral decisionmaker.

CONCLUSION

For the foregoing reasons, *amicus* American Bar Association urges that the *en banc* decision of the Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

**STANDARDS RELATING TO INTERIM STATUS:
THE RELEASE, CONTROL, AND DETENTION
OF ACCUSED JUVENILE OFFENDERS
BETWEEN ARREST AND DISPOSITION**

* * * *

GENERAL INTRODUCTION

The detention of juveniles prior to adjudication or disposition of their cases represents one of the most serious problems in the administration of juvenile justice. The problem is characterized by the very large number of juveniles incarcerated during this stage annually, the harsh conditions under which they are held, the high costs of such detention, and the harmful after-effects detention produces. These difficulties are caused or compounded by profound defects in the system of juvenile justice itself: in the inadequacy of the information and the decision-making process that leads to detention; in the delays between arrest and ultimate disposition; and in the lack of visibility and accountability that pervades the process.

In contrast to the pretrial stage, much greater care and sensitivity is usually devoted to the postadjudicative disposition, its facilities, and its alternatives to incarceration. The result, paradoxically, is considerably less detention under better conditions once the juvenile justice system ceases to presume that the juvenile is innocent.

The basis of reform in this area should be a new focus on the importance and integrity of pretrial decision making, and on the development of an informed, speedy, and responsible process. Standards must be formulated and rules imposed to limit the process, to the extent possible, to performing the historic function of bail in the criminal process—ensuring the presence of the accused at future court proceedings. The standards also need to recognize and regulate candidly the function that bail in the adult

criminal process plays in fact, but declines to acknowledge in law—that some arrested persons are too obviously guilty and apparently too dangerous to others to be released by any reasonable judicial officer.

This volume proceeds on the premise that the danger of too much detention before trial or disposition currently outweighs the danger—both for juveniles and society—of too much release. As a result, the standards here seek to curtail severely—but not eliminate—the discretion to detain that presently characterizes the system. Reducing such discretion is to be accomplished by three methods: narrowing the criteria for permissible detention; reducing permissible delay in the system; and increasing accountability for and review of decisions that curtail interim liberty. The volume incorporates these features in a step-by-step description of the pretrial and predisposition process. Basic principles and general procedural standards are followed by individual sets of standards applicable to each agency and official responsible for the sequential stages of contact with the juvenile.

* * *

3.1 Policy favoring release.

Restraints on the freedom of accused juveniles pending trial and disposition are generally contrary to public policy. The preferred course in each case should be unconditional release.

* * *

3.6 Availability of adequate resources.

The attainment of a fair and effective system of juvenile justice requires that every jurisdiction should, by legislation, court decision, appropriations, and methods of administration, provide services and facilities adequate to carry out the principles underlying these standards. Accordingly, the absence of funds cannot be a justification for resources or procedures that fall below the standards

or unnecessarily infringe on individual liberty. Accused juveniles should be released or placed under less restrictive control whenever a form of detention or control otherwise appropriate is unavailable to the decision maker.

* * *

5.1 Policy favoring release.

Each police department should adopt policies and issue written rules and regulations requiring release of all accused juveniles at the arrest stage pursuant to Standard 5.6A., and adherence to the guidelines specified in Standard 5.6 B. in discretionary situations. Citations should be employed to the greatest degree consistent with the policies of public safety and insuring appearance in court to release a juvenile on his or her own recognizance, or to a parent.

* * *

6.4 Responsibility for status decision.

Once an arrested juvenile has been brought to a juvenile facility, the responsibility for maintaining or changing interim status rests entirely with the intake official, subject to review by the juvenile court. Release by the facility should be mandatory in any situation in which the arresting officer was required to release the juvenile but failed to do so.

* * *

6.6 Guidelines for status decision.

A. Mandatory release. The intake official should release the accused juvenile unless the juvenile:

1. is charged with a crime of violence which in the case of an adult would be punishable by a sentence of one year or more, and which if proven is likely to result in commitment to a security institution, and one or more of the following additional factors is present:

- a. the crime charged is a class one juvenile offense;

- b. the juvenile is an escapee from an institution or other placement facility to which he or she was sentenced under a previous adjudication of criminal conduct;
- c. the juvenile has a demonstrable recent record of willful failure to appear at juvenile proceedings, on the basis of which the official finds that no measure short of detention can be imposed to reasonably ensure appearance; or

2. has been verified to be a fugitive from another jurisdiction, an official of which has formally requested that the juvenile be placed in detention.

B. Mandatory detention. A juvenile who is excluded from mandatory release under subsection A. should not, *pro tanto*, be automatically detained. No category of alleged conduct or background in and of itself should justify a failure to exercise discretion to release.

C. Discretionary situations.

1. Release vs. detention. In every situation in which the release of an arrested juvenile is not mandatory, the intake official should first consider and determine whether the juvenile qualifies for an available diversion program, or whether any form of control short of detention is available to reasonably reduce the risk of flight or misconduct. If no such measure will suffice, the official should explicitly state in writing the reasons for rejecting each of these forms of release.

2. Unconditional vs. conditional or supervised release. In order to minimize the imposition of release conditions on persons who would appear in court without them, and present no substantial risk in the interim, each jurisdiction should develop guidelines for the use of various forms of release based upon the resources and programs available, and analysis of the effectiveness of each form of release.

3. Secure vs. nonsecure detention. Whenever an intake official determines that detention is the appropriate interim status, secure detention may be selected only if clear and convincing evidence indicates the probability of serious physical injury to others, or serious probability of flight to avoid appearance in court. Absent such evidence, the accused should be placed in appropriate form of nonsecure detention, with a foster home to be preferred over other alternatives.

* * *

7.6 Release hearing.

A. Timing. An accused juvenile taken into custody should, unless sooner released, be accorded a hearing in court within [twenty-four hours] of the filing of the petition for a release hearing required by Standard 6.5 D. 2.

B. Notice. Actual notice of the detention review hearing should be given to the accused juvenile, the parents, and their attorneys, immediately upon an intake official's decision that the juvenile will not be released prior to the hearing.

C. Rights. An attorney for the accused juvenile should be present at the hearing in addition to the juvenile's parents if they attend. There should be a strong presumption against the validity of a waiver of any constitutional or statutory right of the juvenile, and no waiver should be valid unless made in writing by the juvenile and his or her counsel.

D. Information. At the review hearing, information relevant to the interim status of an accused juvenile, other than information bearing on the nature and circumstances of the offense charged and the weight of the evidence against the accused juvenile, need not conform to the rules pertaining to the admissibility of evidence in a court of law.

E. Disclosure. The juvenile and the attorney should have full access to all information and records upon which a judge relies in refusing to release the juvenile from detention, or in imposing conditions of supervision.

F. Probable cause. At the time of the initial detention hearing, the burden should be on the state to demonstrate that there is probable cause to believe that the juvenile committed the offense charged.

G. Notice of right to appeal. Whenever a court orders detention, or denies release upon review of an order of detention, it should simultaneously inform the juvenile, orally and in writing, of his or her rights to an automatic seven-day review under Standard 7.9 and to immediate appellate review under Standard 7.12.

7.7 Guidelines for status decisions.

A. Release alternatives. The court may release the juvenile on his or her own recognizance, on conditions, under supervision, including release on a temporary, non-overnight basis to the attorney if so requested for the purpose of preparing the case, or into a diversion program.

B. Mandatory release. Release by the court should be mandatory when the state fails to establish probable cause to believe the juvenile committed the offense charged or in any situation in which the arresting officer or intake official was required to release the juvenile but failed to do so, unless the court is in possession of additional information which justifies detention under these standards.

C. Discretionary situations. In all other cases, the court should review all factors that officials earlier in the process were required by these standards to have considered. The court should review with particularity the adequacy of the reasons for detention recorded by the police and the intake official.

D. Written reasons. A written statement of the findings of facts and reasons why no measure short of de-

tention would suffice should be made part of the order and filed immediately after the hearing by any judge who declines to release an accused juvenile from detention. An order continuing the juvenile in detention should be construed as authorizing nonsecure detention only, unless it contains an express direction to the contrary, supported by reasons. If the court orders release under a form of control to which the juvenile objects, the court should upon request by the attorney for the juvenile, record the facts and reasons why unconditional release was denied.

* * *

7.9 Continuing detention review.

A. The court should hold a detention review hearing at or before the end of each seven-day period in which a juvenile remains in interim detention. At the first detention review hearing after the expiration of the time prescribed for execution of the dispositional order, the judge must execute such order forthwith, or fully explain on the record the reasons for the delay, or release the juvenile.

B. A list of all juveniles held in any form of interim detention, together with the length of such detention and the reasons for detention, should be prepared by the intake official and presented weekly to the presiding judge. Such reports, with names deleted, should simultaneously be made public to describe the number, duration, and reasons for interim detention of juveniles.

* * *

10.2 Use of adult jails prohibited.

The interim detention of accused juveniles in any facility or part thereof also used to detain adults is prohibited.

* * *

10.6 Education.

All accused juveniles held in interim detention should be afforded access to the educational institution they normally attend, or to equivalent tutorial or other programs adequate to their needs, including an educational program for "exceptional children."

10.7 Rights of juveniles in detention.

Each juvenile held in interim detention should have the following rights, among others:

A. Privacy. A right to individual privacy should be honored in each institution. Because different children will desire different settings, and will often change their minds, substantial allowance should be made for individual choice, and for private as well as community areas, with due regard for the safety of others.

B. Attorneys. A private area within each facility should be available for conferences between the juvenile and his or her attorney at any time between 9 a.m. and 9 p.m. daily.

C. Visitors. Private areas within each facility should be available as contact visiting areas. The period for visiting, although subject to reasonable regulation by the facility staff, should cover at least eight hours every day of the week, and should conform to school regulations when the juvenile is attending school outside the facility. All regulations concerning visitors and visiting hours should be subject to review by the juvenile court.

D. Telephone. Each juvenile in detention should have ready access to a telephone between 9 a.m. and 9 p.m. daily. Calls may be limited in duration, but not in content nor as to parties who may be contacted, except as otherwise specifically directed by the court. Local calls should be permitted at the expense of the institution, but should under no circumstances be monitored. Long distance calls in reasonable number may be made to a par-

ent or attorney at the expense of the institution, and to others, collect.

E. Restrictions on force. Reasonable force should only be used to restrain a juvenile who demonstrates by observed behavior that he or she is a danger to himself or herself or to others, or who attempts to escape. All circumstances concerning any use of force or unusual restrictions, including the circumstances that gave rise to such use, should be reported immediately to the juvenile facility administrator and the juvenile's attorney and parent.

F. Mail. Mail from or to an accused juvenile should not be opened by authorities. If reasonable grounds exist to believe that mail may contain contraband, it should be examined only in the presence of the juvenile.

* * * *

UNITED NATIONS, CONVENTION ON THE RIGHTS
OF THE CHILD

ARTICLE 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below 18 years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of their age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances.

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

U.S. DEPARTMENT OF JUSTICE STANDARDS FOR
THE ADMINISTRATION OF JUVENILE JUSTICE

3.155 Initial Review of Detention Decisions

Upon determining that the subject of a delinquency complaint should be detained, the intake officer should file a written notice with the family court together with a copy of the complaint. The notice should specify the terms of detention, the basis for imposing such terms, and the less restrictive alternatives, if any, that may be available. A copy of the notice should be given to the family court section of the prosecutor's office, the juvenile, and the juvenile's attorney and parents, guardian, or primary caretaker.

Unless the juvenile is released earlier, a detention hearing should be held before a family court judge no more than twenty-four hours after the juvenile has been taken into custody. At that hearing, the state should be required to establish that there is probable cause to believe that a delinquent offense was committed and that the accused juvenile committed it. If probable cause is established, the court should review the necessity for continued detention. Unless the state demonstrates by clear and convincing evidence that continued secure or non-secure detention is warranted, the court should place the juvenile in the least restrictive form of release consistent with the purposes and factors set forth in Standard 3.151.

At the inception of the detention hearing, the judge should assure that the juvenile understands his/her right to counsel, should appoint an attorney to represent the juvenile if the juvenile is not already represented by counsel, and meets the eligibility requirements set forth in Standard 3.132.

If detention is continued, the family court judge should explain, on the record, the terms of detention and the reasons for rejecting less restrictive alternatives. If the

terms differ from those imposed by the intake officer, a written copy of those terms should be given to the juvenile and the juvenile's attorney and parents, guardian, or custodian.

No detention decision should be made on the basis of a fact or opinion that has not been disclosed to counsel for the state and for the juvenile.

The same procedures and time limits should apply to the matters under the jurisdiction of the family court over noncriminal misbehavior, except that the terms of detention in noncriminal misbehavior cases should be assessed against the criteria set forth in Standard 3.153.

Sources

See generally National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, Standard 12.11 (1976) [hereinafter cited as *Report of the Task Force*]; see also Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, *Standards Relating to Interim Status*, Standards 4.3 and 7.7-7.8, and *Standards Relating to Dispositional Procedures*, Standard 2.4(a) (tentative draft, 1977) [hereinafter cited as IJA/ABA, *Interim Status* and IJA/ABA, *Dispositional Procedures*, respectively].

Commentary

This standard recommends that the decision to detain the subject of a complaint filed pursuant to the jurisdiction of the family court over delinquency and noncriminal misbehavior should be judicially reviewed within twenty-four hours of the time at which the subject of the complaint was taken into custody. It recommends further that this review take place during a hearing at which the detained person is entitled to counsel and at which the state is required to prove that there is probable cause to believe the allegations in the complaint are true.

All of the recent national standards-setting or model legislative efforts recommend that there be an opportunity for judicial review of detention decisions. U.S. Department of Health, Education and Welfare, the *Model Act for Family Courts*, Section 23 (1975); the *Uniform Juvenile Court Act*, Section 17 (National Conference of Commissioners for Uniform State Laws, 1968); the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime*, 37 (1967); and the National Advisory Committee on Criminal Justice Standards and Goals, *Courts*, Section 14.2 (1973), as well as the IJA/ABA, *Interim Status*, *supra*, and the *Report of the Task Force*, *supra*, recommend that such hearings be mandatory. Most states provide for, and many require, a detention hearing.

Provisions regarding the time period in which such hearings should be held vary. All but one of the groups recommending a mandatory detention hearing propose that such hearings be held within forty-eight hours of arrest. The *Uniform Juvenile Court Act*, *supra*, sets a 72-hour limit. State provisions range from no specifications as to time, to the requirements in at least two jurisdictions that detention hearings be held within twenty-four hours.

Determining what time limit should be applied involves balancing two sets of competing interests. On the one hand, the intake officer needs time to gather the information necessary to make the intake and detention decisions and to prepare the necessary paper work, see Standards 3.143, 3.144, and 3.151, and the family court section of the prosecutor's office must have some opportunity to prepare the evidence and contact the witnesses for the probable cause determination at the detention hearing. On the other hand, there is the harsh impact that even brief detention may have on a juvenile, especially when he/she is placed in a secure facility, and the corresponding need to assure as quickly as possible that such deten-

tion is necessary. Although it is recognized that the 24-hour period (including holidays and weekends) proposed in this standard will cause some difficulty in those few cases in which it is necessary to detain a juvenile, especially in rural areas, the cost of detention both to the juvenile and the taxpayers warrants such a stringent prescription.

Procedurally, the standard proposes that intake officers prepare a notice as soon as possible after making the decision to detain that explains the restraints imposed, the less restrictive alternatives that were rejected, and the reasons for rejecting them. This explanation should be in terms of the purposes and criteria set forth in Standard 3.151. Together with the similar explanation to be provided by the judge in the event detention is continued, it is part of the effort throughout these standards to make discretionary decisions more consistent and open to review. *See, e.g.*, Standards 2.242-2.245, 2.342-2.343, 3.143-3.145, 3.182-3.184, 3.188, 4.54, 4.71-4.73 and 4.81-4.82. The notice, together with a copy of the complaint, is to be filed with the family court in order to provide a basis for the hearing and given to the parties in order to provide each side at least some opportunity to prepare. This procedure is comparable to that recommended by the IJA/ABA, *Interim Status*, *supra*.

As noted earlier, the standard recommends that the judge must find that there is a legally sufficient basis on which to hold the juvenile before reviewing whether detention is necessary. This is consistent with the Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975). Unlike the Task Force provision, the standard does not bar the use of hearsay to show probable cause. This follows the majority view in *Gerstein* that the full panoply of adversary procedures need not apply to most probable cause determinations. Moreover, given the brief time available, it would be impractical to require the state to present a full slate of witnesses. However, the standard, together with Standard 3.171, goes beyond

Gerstein in recommending that the subject of the delinquency or noncriminal misbehavior complaint be afforded the right to counsel, to be present at the detention hearing, to present evidence, and to call and cross-examine witnesses. Although these procedures do "freight" juvenile proceedings with "trial-type procedures," *Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976), the significance of the detention decision for the juvenile makes such safeguards essential. The opportunity for a probable cause determination for juveniles not held in custody is recommended in Standard 3.165.

The standard provides further that no information relied upon in deciding whether detention is to be continued should be withheld from the attorney for the state, the attorney for the juvenile, and in noncriminal misbehavior proceedings the attorney for the juvenile's parents, guardian, or primary caretaker. *See* Standards 3.131-3.133. This is in keeping with the recommendations for broad disclosure by all participants of the proceedings throughout these standards. *See* Standards 3.167 and 3.187. Whether potentially harmful information should be revealed to the juvenile or the juvenile's parents or parental surrogate, is left to the discretion of counsel.

The procedures for review of decisions to place juveniles alleged to have been neglected or abused in emergency custody are discussed in Standard 3.157.

* * *

3.158 Review, Modification, and Appeal of Detention and Emergency Custody Decisions

A review hearing should be held at or before the end of each seven-day period in which a person subject to the jurisdiction of the family court over delinquency or noncriminal misbehavior remains in secure or nonsecure detention, or whenever new circumstances warrant an earlier review.

In accordance with a specific order of the family court, an intake officer may at any time relax conditions of release, which the court has approved or imposed, if the restrictions are no longer necessary. A notice stating the changed circumstances and the new conditions should be filed with the court and a copy sent to the juvenile, the juvenile's attorney, and parents, guardian, or primary caretaker, and to the family court section of the prosecutor's office.

Secure or nonsecure detention or more stringent conditions should be imposed only by the family court following a hearing at which the circumstances justifying the additional restrictions, including a willful violation of the conditions of release or a willful failure to appear, are demonstrated by clear and convincing evidence. The decision to impose additional restrictions should be made in accordance with the criteria set forth in Standards 3.151 and 3.152 for delinquency cases and Standard 3.153 for noncriminal misbehavior cases, and in the same manner as in Standard 3.155.

The subject of a complaint or petition should be entitled to appeal an order of the family court imposing or denying release from detention, or other significant restraint on liberty. The notice of appeal should include a copy of the order and of the reasons for that order given by the family court. Appeals from detention orders should be heard and decided as expeditiously as possible.

The same review, modification, and appellate procedures should apply to neglect and abuse proceedings in which the juvenile has been placed in emergency custody, and the same modification and appellate procedures should be applicable to neglect and abuse proceedings in which conditions designed to protect the juvenile have been imposed on the juvenile's parents, guardian, or primary caretaker.

Sources:

See generally Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, *Standards Relating to Interim Status*, Standards 4.5, 7.10, 7.12, and 7.13 (tentative draft, 1977) [hereinafter cited as IJA/ABA, *Interim Status*]; National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, Standard 12.11 (1976) [hereinafter cited as *Report of the Task Force*].

Commentary

In keeping with the concern over the impact of long-term detention or emergency custody of juveniles, this standard provides for recurring review of such detention or custody. The review is intended to assure that detention or emergency custody is still warranted and to encourage prompt adjudication.

The standard requires a judicial review hearing every seven days or whenever new circumstances arise. This combines the short time period recommended by the IJA/ABA Joint Commission with the more flexible criterion proposed by the *Report of the Task Force*, *supra*; IJA/ABA, *Interim Status*, *supra*; Standard 7.10; *Report of the Task Force*, *supra*. The Wisconsin Council on Criminal Justice, Special Study Committee on Criminal Justice Standards and Goals, *Juvenile Justice Standards and Goals*, Section 7.3 *et seq.* (1975) urges that detention in delinquency cases be reviewed every five days.

The second paragraph of the standard is to encourage family court judges to identify the circumstances in which the intake officer may terminate the detention or emergency custody or may ease or void the conditions. Intake officers are not provided the power to relax the conditions of detention or release without judicial approval. However, intake officers should be authorized to seek such approval when the situation warrants.

Imposition of more stringent conditions on release or, in neglect and abuse matters, on continued parental custody of the child require a court order so as to assure that the added restraints are warranted. One of the circumstances justifying a tightening of the conditions of release or placing the juvenile in more restrictive detention is a willful violation of the conditions of release.

Finally, the standard provides for interlocutory appeal of decisions approving or imposing detention, emergency custody, or other significant restraints on liberty. Such appeals should be processed and decided as expeditiously as possible. It is anticipated that many appeals of detention decisions will be heard by a single appellate court judge. The provisions approved by the IJA/ABA, *Interim Status, supra* recommend that appeals of detention decisions be heard within twenty-four hours of the filing of the notice of appeal and decided at the conclusion of appellate argument. IJA/ABA, *Interim Status, supra* at Standard 7.12.

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AMERICAN IMMIGRATION LAWYERS ASSOCIATION REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association express support for improving the asylum process and facilitating exercise of the right to counsel consistent with INA sec 292 as amended by calling upon the Immigration and Naturalization Service and the Executive Office of Immigration Review to implement the July 1989 recommendations of the ABA Coordinating Committee on Immigration Law, including:

a. Facilitating effective access by asylum applicants in exclusion and deportation proceedings to legal representation, improving physical and telephonic access between detained asylum seekers and legal representatives, disseminating accurate lists of legal service providers, permitting legal service organizations to provide general orientation programs and distribute informational and legal materials to detained persons.

b. Providing complete and accurate interpretation of all immigration court proceedings, including all testimony, and allowing for unrepresented applicants to submit asylum applications in a language other than English.

c. Detaining asylum seekers only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings. The INS should explore alternative means of ensuring appearance at court proceedings, such as supervised conditional pretrial release. Bond, when imposed, should be based upon the applicant's economic means and the likelihood of absconding, and work authorization should be granted during the entire course of the application process. Counsel should be permitted to enter limited appearances for bond and custody proceedings.

BE IT FURTHER RESOLVED, That the American Bar Association support a humane and enforceable safe

haven mechanism to provide protection to persons who are unable to return to their home countries due to conditions that endanger their safety and well-being; and that nationals of the People's Republic of China, El Salvador, and Nicaragua should be among the first beneficiaries of the aforementioned protections.

* * * *

REPORT

ASYLUM.

I. General.

The Refugee Act of 1980 established for the first time a statutory basis for individuals fleeing persecution in their homelands to obtain asylum in the United States. Derived from the United Nations Protocol Relating to the Status of Refugees, to which the U.S. acceded in 1968, the Refugee Act was principally intended to bring U.S. refugee law into conformity with international standards by establishing uniform asylum procedures and eliminating the ideological considerations that had dominated prior refugee determinations. S. Rep. No. 256, 96th Cong., Sess. 4, at 1-2, reprinted in *U.S. Code Cong. and Admin. News* 149 (1980).

The law permits the Attorney General to grant asylum to an alien in the United States, irrespective of his or her immigration status, who can demonstrate that he or she is a "refugee." *i.e.*,

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, national-

ity, membership in a particular social group or political opinion. 8 U.S.C. § 1101(a)(42)(A).

Each word and phrase of the definition of "refugee" has legal significance which has been analyzed both in U.S. Courts and in 1979 Handbook of the United Nations High Commissioner for Refugees, which was prepared to guide nations in construing the obligations contained in the U.N. Protocol. Every asylum petitioner in the U.S. is the subject of a complex legal determination, based upon this definition, which the Attorney General has delegated to the INS and immigration judges.

Persons entitled to asylum may face torture, imprisonment, or death as a result of an erroneous denial of their asylum. Special linguistic, cultural, and psychological disabilities often make it extremely difficult for refugees to clearly articulate their experiences or freely discuss their views, particularly with government officials. Constitutional standards of due process, therefore, mandate a broad range of procedural safeguards to ensure an appropriate asylum determination. For applicants who lack knowledge of our language and legal system, full and effective representation by counsel is one of the most important means by which to ensure a fair and accurate determination.

The role of lawyer, or qualified legal representative, in an asylum case is to prepare the asylum application, identify witnesses and gather supporting documentary evidence, help the applicant to identify clearly the relevant facts of his or her case and to describe effectively the situation that engenders the fear of persecution. While valuable for all applicants, this assistance is indispensable for applicants who are detained and have no access to sources of evidence that are necessary to meet their burden of proof. Unlike a defendant in a criminal proceeding, however, an asylum applicant's right to counsel in immigration proceedings must be at "no expense to the government."

Representation by counsel appears to be a significant factor in the outcome of the asylum determination. A General Accounting Office report has calculated that applicants who have legal representation are more than twice as likely as unrepresented applicants to be granted asylum by the INS district directors in a nonadversarial process, and more than three times as likely to receive asylum from immigration judges in adversarial proceedings. See *Asylum: Approval Rates for Selected Applicants* (June 1987), Appendix Table 1.1. While these figures suggest that the asylum system must be improved for applicants who appear without counsel, they demonstrate that, under the present system, the participation of counsel is a highly determinative factor in ensuring that bona fide applicants receive the full and fair asylum adjudications to which they are entitled.

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No. 91-905

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

**WILLIAM P. BARR, Attorney General of the
United States, et al.,
*Petitioners,***

vs.

**JENNY LISETTE FLORES, et al.,
*Respondents.***

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR AMICUS CURIAE
AMNESTY INTERNATIONAL U.S.A.
IN SUPPORT OF RESPONDENTS**

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

Petitioners,

v.

JENNY LISETTE FLORES, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOR AMICUS CURIAE
AMNESTY INTERNATIONAL U.S.A

IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Amnesty International USA respectfully submits this brief as *amicus curiae* in support of Respondents Jenny Lisette Flores, *et al.*¹

Amnesty International USA ("AIUSA") is one of over forty national sections of Amnesty International ("AI"), a world-wide movement that works impartially for the release of prisoners of conscience,² for fair and prompt trials for all political prisoners, and for an end to the use of torture and all other conduct that is cruel, degrading, or inhuman.

AI's mandate is based upon the Universal Declaration of Human Rights, GA Res. 217A, U.N.Doc.A/810 (1948) and upon other international legal standards for the protection of human rights. AI is independent of any government or regime, political ideology or grouping, economic interest, or religious belief. AI asks all governments to comply without discrimination with international standards to protect human rights. In furtherance of its mandate, AI's International Secretariat, based in London, collects and reviews information on human rights conditions throughout the world, and disseminates this information

¹ The Petitioner and Respondent have consented to the submission of this brief.

² AI defines prisoners of conscience as those persons who are detained on the basis of their race, color, religion, ethnic origin, language, sex, or political beliefs, provided that they have neither used nor advocated violence.

to international organizations, governments and the public at large.³

Because AI opposes the forcible return of any person to a country where he or she may be imprisoned or otherwise persecuted as a "prisoner of conscience," AI works to ensure that all governments observe the principle of non-refoulement expressed in the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S.150 ("the Convention") and incorporated in the U.N. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T 6223, 606 U.N.T.S. 268 ("the Protocol"). AIUSA welcomed initiatives to amend the Immigration and Nationality Act ("INA") (8 U.S.C. §§ 1101-1153 in order to bring the United States into compliance with its international obligations under the Protocol, and testified in the hearings preceding the enactment of the Refugee Act of 1980, Pub.L. No.96-212, 94 Stat. 102. AIUSA has provided information about human rights conditions and international human rights standards to various organizations involved in the refugee and asylum process. In its 1990 Report, AIUSA documented some concerns about the implementation of U.S. Refugee policy.⁴ These concerns included the apparent bias against asylum seekers from Guatemala, El Salvador and Haiti, and the use of restrictive detention or interdiction

³ AI has formal consultative status or similar formal relations with the United Nations, UNESCO, the Organization of American States, the Council of Europe, and the Organization of African Unity.

⁴ AIUSA, Reasonable Fear: Human Rights and United States Refugee Policy (1990).

practices to deter the presentation or pursuit of asylum claims.⁵

AIUSA recognizes that in some exceptional circumstances detention of asylum seekers may be necessary, but opposes detention that is discriminatory or used to deter asylum seekers or in any way infringes the right to a fair determination of refugee status. AIUSA strongly opposes all detention of refugee children unless required by exceptional circumstances.⁶

SUMMARY OF ARGUMENT

The regulations at issue in this case, promulgated under 8 U.S.C. § 1252(a)(1), apply to the detention of children apprehended by the INS and placed in deportation proceedings. Prior to any determination of their immigration status in deportation hearings, children who are otherwise eligible for release are detained rather than released to an unrelated responsible adult, if they cannot be released to a parent, adult relative or legal guardian. AIUSA respectfully urges this Court to affirm

⁵ The respondent class in the instant case includes many children who are nationals of Central American countries, including El Salvador and Guatemala. In recent years, AI has issued numerous reports on human rights conditions in these and other Central American countries and has also made numerous public and diplomatic appeals concerning the serious violations of human rights. AI's reports demonstrate that children as well as adults are at risk of human rights violations.

⁶ AIUSA, Reasonable Fear, supra, note 4, p. 27.

the Ninth Circuit's en banc decision that the INS regulations are unconstitutional.⁷

As the law of the land, international treaties and norms of customary international law are relevant to the construction of constitutional and statutory provisions. Because the regulations apply not to deportable children but to those awaiting determination of their status, they necessarily encompass a group who may be entitled to special protection as refugees. Congress amended the INA with the express purpose of bringing U.S. law into compliance with its treaty obligations as a signatory to the Protocol and incorporated international treaty standards into the INA through the Refugee Act of 1980. Accordingly, this Court should consider these international legal standards in its determination of the constitutional interests at stake. Furthermore, under long-established canons of construction, treaty provisions and customary norms inform the interpretation of constitutional as well as statutory law even when not directly incorporated into a domestic statute, as in the case of the Protocol and the Refugee Act of 1980. Thus other treaties and customary norms are significant sources of positive law that guide the interpretation of constitutional rights.

The Court of Appeal's decision is entirely consistent with international human rights instruments for the protection of children and refugees and gives effect

⁷ Flores v. Meese, 942 F.2d 1352 (9th Cir. 1991), cert. granted sub. nom Barr v. Flores, 112 S.Ct. 1261 (1992) ("Flores").

to this country's international obligations under the Protocol and the International Covenant on Civil and Political Rights. International law supports the Court of Appeal's conclusion that under the Fifth Amendment's Due Process Clause, the refugee children subject to the INS regulations have a substantial liberty interest in freedom from government confinement that is not diminished by their status as minors or aliens. International law also supports the conclusion that there is no significant government interest outweighing the liberty interest at stake, and that the regulations cannot be justified as rationally related to the government's stated interest in securing the welfare of minors.

ARGUMENT

INTERNATIONAL LEGAL STANDARDS SUPPORT THE CONCLUSION THAT THE INS'S DETENTION POLICY UNCONSTITUTIONALLY DEPRIVES UNACCOMPANIED ALIEN CHILDREN IN DEPORTATION HEARINGS OF DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH AMENDMENT

A. The Due Process Provisions of the Constitution Should Be Informed By Treaty Provisions and Customary International Law

In considering the reach of the due process protections guaranteed by the Fifth Amendment, it is appropriate for this Court to consider the United States' obligations under international human rights law.⁸ The

⁸ International law, which comprises both treaties and customary international law, is part of the law of the United States. Whereas treaties create specific legal obligations only on those states that ratify or accede to them, customary international law is binding on all states.

The United States has ratified, and is therefore legally bound by, two international human rights treaties relevant to this case: the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 268 ("the "Protocol"), which the U.S. ratified in 1968, and the International Covenant on Civil and Political Rights, Dec. 16, 1966, GA res. 2200A (XXI), 21 UN GAOR, Supp. (No. 16) at 52, UN Doc. A/6316 (1966) *entered into*

(continued...)

Supreme Court has long held that statutes, wherever possible, must be interpreted consistently with international law. Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)). This interpretative approach not only ensures that the United States will not inadvertently run afoul of its international law obligations, but also provides an additional authoritative source of law to which courts can turn in resolving cases where domestic law is not settled. In determining whether government action violates constitutionally protected rights, international human rights provisions may be used to interpret due process protections. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (referring to international legal standards in applying heightened

⁴(...continued)

force Mar. 23, 1976 ("ICCPR"), which the U.S. ratified on June 1, 1992.

In ascertaining the existence of a customary norm of international law, a court must consider whether a practice has ripened into a "settled rule of international law" by "the general assent of civilized nations." Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) citing The Paquete Habana, 175 U.S. at 694. In making this determination, courts can look to a number of sources: judicial decisions recognizing and enforcing the norm, and the works of scholars and jurists. See United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-161 (1820); Filartiga, *supra*. They can also look to treaties and other international agreements that are intended for adherence by states generally and are in fact widely accepted. Restatement (Third) Foreign Relations Law of the United States, Section 102 (1987).

scrutiny to constitutional review of Texas statute denying free public education to illegal alien children).

B. The Government's Indefinite Detention Of Alleged Alien Children Who Could Be Released To Non-Relatives Is Inconsistent With International Law

Since World War II, the United Nations and regional intergovernmental bodies have promulgated an array of multilateral treaties, declarations, and resolutions concerning fundamental human rights, many of which have now ripened into customary norms of international law. Restatement, supra, Section 702. See also, Lillich and Newman, International Human Rights: Problems of Law and Policy, p. 67 (1979).

International human rights standards prohibit arbitrary arrest or detention, and require that all people deprived of their liberty be brought promptly before a judge. Article 9(1) of the ICCPR provides that "no one shall be subjected to arbitrary arrest or detention." Article 9(4) states that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention. . . ." Principle 11.1 of the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment⁹ ("U.N. Body of

⁹ The U.N. Body of Principles is a set of internationally recognized standards adopted by consensus by the U.N. General Assembly on December 9, 1988.

Principles") states that "a person shall not be kept in detention without being given an opportunity to be heard properly by a judicial or other authority "with the strongest possible guarantees of competence, impartiality and independence."

International standards also require prompt notification of the arrest and the whereabouts of detainees to families or friends. Principle 16.1 of the U.N. Body of Principles states that a person who is detained is entitled to promptly notify members of his family or other appropriate individuals of his detention. In cases involving arrest or detention of juveniles Principle 16.2 requires automatic notification by the authorities themselves to parents or guardians.

Numerous international instruments have recognized the special care and protection due to children, including the Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, GA Res. 217A (III), UN Doc. A/810, at 71 (1948) (Article 25); the Declaration of the Rights of the Child, adopted by the United Nations in 1959, 14 U.N. GAOR Supp. (No. 16), U.N. Doc. A/4059 (1959); the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, GA Res. 2200A (XXI), 21 UN GAOR, Supp. (No. 16) at 52, UN Doc. A/6316 (1966) *entered into force* Mar. 23, 1976, (Articles 2.1, 9.4, 10, and 24); the International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) *entered into force* Jan. 3, 1976 (Article 10); and the Convention on the Rights of

the Child (the "Children's Convention"), U.N. G.A. Doc. A/44/736 (1989).

The Children's Convention, adopted by the United Nations General Assembly on November 20, 1989¹⁰, and other international instruments, state and federal practices, judicial decisions, and scholarly works provide persuasive evidence of an international norm recognizing the special protections owed to children.¹¹ The Children's Convention, for example, requires that in all actions concerning children the best interests of the child shall be a primary consideration. *Id.* Article 3.

With regard to the detention of children, Article 37(b) states unequivocally that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. (Emphasis added.)

Article 37(d) further requires that:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to

¹⁰ The United States has signed but has not ratified this Convention.

¹¹ Children are defined in Article 1 of the Children's Convention as those under 18, unless the law applicable to the child provides for an earlier age of majority.

challenge the legality of his deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action. (Emphasis added.)

With regard to children who are refugees, Article 22.1 of the Convention requires states parties:

To ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Article 22.2 further requires that if no parents or other family members can be found, "the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention". (Emphasis added.)

The International Covenant on Civil and Political Rights, which the U.S. has ratified and which therefore is a legally binding instrument, also provides special protection for children without regard to their legal status.

Article 2(1) of the ICCPR requires each state party

to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Emphasis added)

Article 10.2.(b) requires special protection for detained children, providing that "accused juvenile persons . . . be separated from adults and brought as speedily as possible for adjudication."

Finally, Article 24.1 provides that:

Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the party of his family, society and the State. (Emphasis added.)

The Conventions underscore that children, regardless of their status in deportation proceedings, should be detained pending such proceedings only as a matter of last resort, and then only in accordance with stringent procedural protections.

C. International Legal Standards Disfavor
The Detention Of Refugees.

In 1968, the United States acceded to the United Nations Protocol on Refugees, and thereby agreed to certain binding obligations under international law. Between 1968 and 1980, there were a number of Congressional initiatives to amend the INA so as to bring domestic immigration law into conformity with this country's obligations under the Protocol. These initiatives came to fruition in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat 102 (1980) which was enacted for the express purpose of bringing U.S. law into compliance with its international treaty obligations. H. Conf. Rep. No. 96-781, 96th Cong. 2d Sess. (1980), reprinted in 1980 U.S. Code Cong. and Ad. News, 141.

The Refugee Act revised the 1952 Immigration and Nationality Act, 8 U.S.C. § 1101, to ensure that it afforded refugees the rights to which they were entitled under the "international treaty obligations" of the Protocol. S. Exec. Rep. No. 96-256, 96th Cong., 2d Sess. 1980, reprinted in 1980 U.S. Code Cong. and Ad. News 141 144.¹²

¹² The report accompanying the House Judiciary Committee's version of the bill stated, for example, that:

The first part of the new definition essentially conforms to that used under the United Nations Convention and Protocol Relating to the Status of Refugees All

(continued...)

The objective of conforming U.S. refugee law to its international obligations extended to the entire statutory scheme, as this Court noted in INS v. Cardoza-Fonseca, 480 U.S. 421, 436-437 ("[it] is clear from the legislative history . . . and indeed the entire 1980 Act . . . that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 . . . Protocol). Since statutes "ought never to be construed to violate the law of nations, if any other possible construction remains," Weinberger v. Rossi, 456 U.S. 25, 32 (1982), quoting Murray v. the Charming Betsy, 6 U.S. (2 Cranch) 64 (1804), regulations promulgated under the INA should be construed to be consistent with the Protocol.

Because the regulations at issue here apply to alien children whose status has not been determined, they encompass within their scope children who may be entitled to protection as refugees.¹³

¹²(...continued)

witnesses before the Committee strongly endorsed the new definition, which will finally bring United States law into conformity with the internationally-accepted definition of the term "refugee" set forth in the 1951 United Nations Refugee Convention and the Protocol which our government ratified in 1968.

¹³ As Judge Fletcher noted in her dissent to the majority opinion of the three judge panel in Flores, the INS regulations authorize a policy of blanket detention of
(continued...)

The Refugee Act permits individuals to present a claim for asylum in the United States regardless of whether their entry to this country was legal. 8 U.S.C. § 1158(a). Under the Protocol, the United States must comply with the rule of non-refoulement which prohibits return of refugees to countries where, for reasons of their race, religion, nationality, membership in a particular social group or political opinion they would likely face persecution.

The Handbook on Procedures and Criteria For Determining Refugee Status (the "Handbook") published by the United Nations High Commissioner for Refugees ("UNHCR") makes clear that formal designation of an individual as a refugee is primarily of declaratory not constitutive significance.¹³ The Handbook states that:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because

¹³(...continued)

children whose only possible offense is their alienage and who may eventually be found to be citizens, legal aliens, or refugees entitled to political asylum.

¹⁴ Although AI's mandate differs from that of the UNHCR, the organization regards UNHCR standards as a guide for determining the fair treatment of asylum seekers.

of recognition, but is recognized because he is a refugee. (Handbook, at para. 28.)

The United States Supreme Court has expressly acknowledged its reliance on the Handbook in interpreting the Refugee Act of 1980. See Cardoza-Fonseca, 480 U.S. at 437.¹⁵

Because an individual's actual refugee status predates its formal determination, those with presumptive status are entitled to non-refoulement protection until they are conclusively determined not to be refugees¹⁶. The rationale for the application of the Protocol's most basic protection to presumptive refugees is that it ensures the right of 'genuine' refugees to non-refoulement. This presumptive application of the Protocol's most basic principles is recognized in countries which have acceded to the Protocol and/or the 1951 Convention.¹⁷ Consequently, procedures for determining eligibility for refugee status should not discourage or obstruct the

¹⁵ Use of the Handbook to interpret the Act is also well-established in other courts. See, e.g., Turcios v. INS, 821 F.2d 1396, 1400 (9th Cir. 1987); Ramirez-Ramos v. INS, 814 F.2d 1394, 1397 (9th Cir. 1987).

¹⁶ See Report of the Arusha Conference, Recommendation on the term "Refugee" and Determination of Refugee Status, Executive Committee of the High Commissioner's Programme (30th Session) U.N. Doc. A/AC. 96/INF. 158 at 9.

¹⁷ See Goodwin-Gill, "The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees," Transnational Legal Problems of Refugees (1982) Michigan Yearbook of International Legal Studies 291, at 304.

submission of asylum claims nor impede their proper adjudication. Claims of presumptive refugees must be determined through fair, non-discriminatory procedures.¹⁸ The Handbook sets forth guidelines adopted by the Executive Committee of the UNCHR for procedures to satisfy this basic requirement in light of the particularly vulnerable situation of applicants for refugee status. See Handbook, paras. 190, 195-205.

Because of the vulnerable position of refugees, their detention pending a final determination of status is a disfavored alternative. In a resolution adopted by consensus in 1986, the Office of the UNHCR recommended that detention be avoided whenever possible, because of the hardship it imposes on refugees. UNHCR Exec. Committee Conclusion 44 (1986). The UNHCR's interpretations are entitled to consideration because of its supervisory role under the Convention and Protocol,¹⁹ and because states parties to the instruments

¹⁸ Arusha Conference Report, *supra*, at 12.

¹⁹ The Office of the UNHCR was established by the United Nations General Assembly in 1949. GA Res. 41319, UN Doc. A/1251, at 36 (1949). In 1950, the General Assembly adopted the statute describing the UNHCR's mandate as providing international protection to refugees within the scope of the statute and seeking permanent solutions for the problems of refugees through assistance to government and private organizations. GA Res. 51428, 5 on GAOR Supp. (No. 20) at 46, UN Doc. A11775. Article II (1) of the Protocol confirmed the UNHCR's role.

are obliged to cooperate with the UNHCR in the exercise of its functions.²⁰

If refugees in general are in a particularly vulnerable situation, juvenile refugees are even more at risk. For refugee children who have been exposed to the stresses of human rights abuses in their own countries, discovery by the INS "is itself a traumatic circumstance exacerbating symptoms and fears already present." Children of War -- Victims of Conflict and Dislocation, 1990: Hearings Before the Subcommittee on Children, Families, Drugs and Alcoholism, 101st Congress, 2d Sess., U.S. Senate (Testimony of Dr. Adrienne Aron, April 3, 1990).

To protect children who are refugees, the Handbook recommends that when appropriate, an unaccompanied minor should be appointed a guardian with responsibility to promote a decision in the minor's best interests. (Handbook, para 214.) In the absence of an appointed guardian or parent, the authorities must ensure that the interests of juvenile applicants for refugee status are fully safeguarded. *Id.* Thus, as to children who are also presumptive refugees, the international human rights instruments are in accord. Both groups are vulnerable because of their status and both are recognized as deserving special protection. For both

²⁰ Under Article II(1) of the Protocol, contracting states undertake "to cooperate with the office of the United Nations High Commissioner for Refugees in the exercise of its functions and shall in particular facilitate its duty of supervising the application [of the provisions of the Convention and Protocol]."

groups detention imposes a burden that should be avoided unless required by special circumstances.

D. International Human Rights Law Supports The Conclusion That The INS Detention Policy Unconstitutionally Deprives Respondents Of A Substantial Liberty Interest In Freedom From Detention Guaranteed By The Due Process Clause Of The Fifth Amendment

1. The INS Regulations Infringe The Respondents' Due Process Right To Freedom From Government Detention

Although the Ninth Circuit did not rely on international law in finding that the Respondents have a constitutionally protected, fundamental right to physical liberty, international law principles provide additional support for its construction of the due process interests at stake. These principles lend weight to the precedents recognizing "the individual's fundamental right to freedom from restraint" (see Flores, 942 F.2d at 1365, Tang, J., concurring) and to the proposition that this protection is in no way diminished in this case by the Respondents' status as minors or aliens. Flores, 942 F.2d at 1362.

The district court's order, affirmed by the Court of Appeal, requires children detained by the INS and otherwise eligible for release to a relative or legal guardian to be released to a responsible party if no adult

relative comes forward. This order is consistent with the provisions of international law for the protection of both children and refugees, which in both instances disfavor detention except as a measure of last resort.

The order comports with the provisions of the Children's Convention that children should be detained only as a measure of last resort (Article 37(b)) and that unaccompanied children seeking refugee status, or considered to be refugees under applicable domestic or international law, should be given the same protection as any other child deprived of his family environment (Article 22.2). As the Ninth Circuit (*en banc*) majority explained, state and federal policies concerning the confinement of children recognize "the practical need to avoid institutional detention where less restrictive means are available." Flores v. Meese, *supra*, 942 F.2d at 1361 (citing various examples of state and federal policies). The ICCPR also guarantees children the special protection due to them as minors without any discrimination as to legal status (Articles 2(1) and 24.1). The order is also consistent with the UNHCR guidelines for the protection of refugees calling upon states to avoid detention wherever possible because of the hardship it causes and to take measures to protect unaccompanied children by appointing a guardian or otherwise ensuring that their interest as applicants for refugee status are fully safeguarded. (Handbook, para. 214.)

2. Neither The Government's Plenary Power In Matters Of Immigration Nor The INS's Alleged Concern For The Welfare Of Children Is Sufficient To Outweigh The Respondents' Liberty Interest

The federal government's plenary power over matters of immigration is not insulated from constitutional scrutiny. United States v. Mendoza-Lopez, 481 U.S. 828, 837, fn. 14 (1987) (Court rejects argument that due process was inapplicable to a Congressional statute precluding allegedly illegal aliens from challenging the validity of their deportation order in a subsequent criminal proceeding); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976) (federal plenary power over aliens does not permit the government to arbitrarily subject all resident aliens to different substantive rules than those applied to citizens); Carlson v. Landon, 342 U.S. 524, 541-542, reh'g denied, 343 U.S. 988 (1952) (discretion of the Attorney General to deny bail to resident alien communists undergoing deportation hearings is not unlimited).

Further, by accession to the Protocol, the United States agreed to be bound by the obligation of non-refoulement, which necessarily modifies the plenary power to exclude or expel²¹ aliens who are protected by

²¹ While Respondents' detention has arisen in connection with deportation proceedings, the government has recognized that its broad prohibition against release to
(continued...)

their status as actual or presumptive refugees. Through its accession to the Protocol, the United States is bound by a "Treaty made . . . under the Authority of the United States," the provisions of which are the "supreme law of the land." U.S. Const. Art. VI, § II. Like all treaties, the Protocol qualifies in some measure the sovereignty of the United States. See The F.S. Wimbledon (1923) P.C.I.J., Ser. A, No. 1, 24, 25.

Whilst arguing that this case requires special judicial deference to a policy choice made pursuant to the political branches' plenary power over immigration, the government ignores the effect of its international treaty obligations. Since the Protocol offers its protection to presumptive refugees until they are conclusively determined to be ineligible for refugee status, the INS must implement the INA in accord with the guarantees afforded refugees under the Protocol as incorporated in the domestic statute. A practice of detention in preference to release does not meet the requirements of the Protocol as interpreted by the UNHCR in his supervisory role. See Section D supra. Not only does the government ignore any questions related to the limitations on its plenary power as a party to the Protocol, it has also apparently prejudged -- and summarily dismissed -- any individual claims to refugee

²¹(...continued)

non-related adults is "not related to the issue of flight risk or the administration of any provision of the immigration laws." Flores, 942 F.2d at 1356.

protection for Central American children arising under the Protocol.²²

The government's sole purported justification²³ for detaining children otherwise eligible for release is "for the purpose of fostering their welfare and safety." (Brief for the Petitioners, p. 26.) Even the most minimal scrutiny reveals the absurdity of this contention.

It is a matter of virtually universal consensus that children should be detained only as a matter of last resort, and that releasing them to any responsible adult is far preferable to detaining them, even under ideal conditions. See, e.g., Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders between Arrest and Disposition* (1980); see also, supra, Sections B-C. Not surprisingly, therefore, the INS conspicuously fails to provide any evidentiary support for the proposition that the "welfare and safety" of minors is better protected by custodial detention than by release to an unrelated adult. (*Flores*, 942 F.2d at 1370 (Tang, J.,

²² The government defines the problem of unaccompanied minors apprehended by the INS as one "thrust upon the INS by the combination of socioeconomic conditions in Central America beyond its control—which causes huge numbers of alien juveniles to flee their homelands." (Petitioners' Brief at 31.)

²³ The government concedes that releasing children to unrelated adults does not adversely affect its interest in ensuring the children's appearances at their deportation hearings.

concurring).) Instead, the government favors judicial deference to its regulations because "the decision to detain these aliens has been made by the agency in the Executive Branch responsible for day-to-day implementation of policies with respect to aliens" (Brief for the Petitioners, p. 30) and "in the immigration context, those policy choices are of a political character and therefore subject only to narrow judicial review [citation]." (Brief for the Petitioners, p. 31.)

The government is mixing apples and oranges in attempting to justify its failure to adduce a rational basis for its regulations by relying on its plenary power in the field of immigration, consideration of which is relevant at most, only to the threshold question about the standard of review. It is not the INS' power, but its expertise, which must support any claim, however ill-founded, that deference to the INS obviates the necessity for the government to evidence a rational basis for its regulations.

In light of the general consensus disfavoring the detention of juveniles when other alternatives are available, the government's assertion that the best interests of children are served by detention rather than release is astonishing. The government's professed concern for juveniles seems to be at odds with what one government representative candidly conceded to be the "adverse factors" which could allegedly stem from release to unrelated adults "if every juvenile apprehended is routinely turned over to anyone who claims them, would that (sic) set up a syndrome by which more and more juveniles would come because there would be no

deterrence to coming. They would get exactly what they want." (Joint Appendix, p. 21.) That there is no rational relationship between the policy and the interest of the government in securing the children's welfare is further demonstrated by the INS's failure to do any research or investigation into matters relevant to the welfare of children in deportation proceedings before instituting the regulations prohibiting release to nonrelated adults. (See, Joint Appendix, pp. 9-12, 15.) Without investigating whether a juvenile released to a parent or legal guardian was more or less likely to be harmed than a juvenile released to some other responsible adult, the INS summarily abandoned its prior practice of release to any responsible adult. (Joint Appendix, pp. 15, 20.) That the INS has, on occasion, resorted to detention expressly as a means of deterring possible asylum seekers,²⁴ further undermines the government's claim that the subject regulations are indeed in the best interest of children entitled to seek protection as refugees.

E. The Court Of Appeal's Understanding Of
The Procedural Due Process Requirements
Is Consistent With Fundamental Principles
Of Human Rights Law

In further support of the need for appointment of a guardian to ensure the best interests of an unaccompanied child seeking refugee status, there is wide recognition of the particularly vulnerable situation of children in the asylum process. See e.g. Perez-

²⁴ See, e.g., INS Enhancement Plan For The Southern Border (2/16/89), p. 8.

Funez v. INS, 611 F.Supp. 990, 1002 (C.D. Cal. 1984); M. Olivas, *Unaccompanied Refugee Children: Detention, Due Process and Disgrace*, Stanford L. and Pol. Rev. Spring, 1990, 159-166. Courts too have recognized that "deportation is a harsh remedy", see Cardoza-Fonseca, and that the immigration laws and procedures are complex, particularly for those seeking refuge. Perez-Funez, 611 F.Supp. at 1002; Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) and that those seeking refuge are therefore in a position of extreme vulnerability. Nevertheless, the regulations concerning the conditions for release of unaccompanied minors in deportation proceedings offer children fewer protections than those available in other contexts where their rights are at issue in administrative proceedings.

Since the regulations at issue here were promulgated under an immigration statute amended by the Refugee Act of 1980 to conform those aspects of immigration law relating to refugees to international legal standards, the reasonableness of the regulations should be reviewed in light of those international legal standards.

In construing the Due Process Clause to require additional procedural safeguards for children apprehended by the INS, the Court of Appeal's decision was consistent with international standards appropriate for this Court's consideration.

The district court's order necessitated two changes in procedures established under the immigration regulations. It required an automatic review by an immigration judge of the child's detention instead of

conditioning such review on a request by or on behalf of the detained child; and it required the immigration judge to inquire as to whether any non-relative willing to take temporary custody endangered the child's well-being. In affirming the district court's order, the majority opinion declined to say whether the procedural due process issues should be determined under the standard of Gerstein v. Pugh, 420 U.S. 103 (1975) or Matthews v. Eldridge, 424 U.S. 319 (1976), explaining that the district court's order was proper under either standard. Flores, 942 F.2d at 1364.

In requiring automatic review by an immigration judge of the detention of a child in deportation proceedings, the district court's order gave effect to international principles regarding the right to impartial review of any detention, civil or criminal, and to standards recognizing the greater protection due children on account of their status as minors and disfavoring detention of children except as a measure of last resort. These principles inform the analysis under Matthews v. Eldridge of both the private interest and the risks attendant on its erroneous deprivation. Whether government action must comply with due process depends on whether an individual has a property or liberty interest that courts have considered protected by due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Matthews v. Eldridge. Thus the determination of whether due process is required in a given case first requires a threshold examination of the

interest at stake. See Morrissey v. Brewer, 408 U.S. 471 (1972). As discussed in Section C, supra, international human rights instruments underscore a child's interest to freedom from detention except as a matter of last resort, because of the special protection owed to minors. These principles support the conclusion that the children's private interest is a weighty one, invoking the right to liberty free from government detention, and that the risk of erroneous deprivation of that right has severe consequences for children.

This Court has recognized that children "often lack the experience, perspective and judgment to recognize and avoid choices that would be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635, reh. denied, 444 U.S. 887 (1979). International human rights law is in accord with this principle and with the Court of Appeal's conclusion that the requirement of automatic review by an immigration judge was reasonable in light of children's inferior capability to understand what they are waiving by failing to request a hearing. Flores, 942 F.2d at 1364.

Since the only burden on the government is to provide automatically what it now provides upon request (i.e., a hearing before an immigration judge), the Court of Appeal correctly concluded that the balancing of interests required by Matthews tipped conclusively in favor of the Respondents' right to the procedural due process protection of the additional procedures required by the district court's order.

CONCLUSION

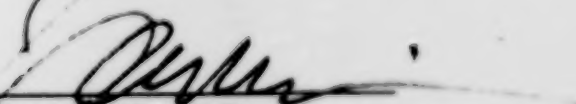
The decision of the Court of Appeal for the Ninth Circuit that the subject INS regulations are unconstitutional under the Due Process Clause of the Fifth Amendment is entirely consistent with international human rights instruments for the protection of children and refugees and gives effect to this country's international obligations under the Protocol and the International Covenant on Civil and Political Rights. Accordingly, AIUSA respectfully urges this Court to affirm the Ninth Circuit's decision.

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Respectfully submitted,

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